TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 240. 34.

THE McKINLEY CREEK MINING COMPANY ET AL.,
APPELLANTS,

vs.

THE ALASKA UNITED MINING COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED APRIL 6, 1900.

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a In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant.

Bill of Exceptions.

1 In the United States District Court for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant.

Testimony Taken on the Trial of the Above-entitled Cause.

PETER HALL, called on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Where do you reside?
A. In Alaska here.
Q. How long have you resided in Alaska?
A. In the neighborhood of eighteen months.
Q. Are you one of the members of the Alaska United Mining Company?
A. I am.
Q. Who are the other members composing that company?
A. Dan. Sutherland, James Hanson, William Chisholm, and Jack Dalton.
Q. You and the parties you have just mentioned are the men that own these claims commonly known as the Hall and Chisholm claims?
A. Yes, sir.
2 Q. Where were you on or about the 10th day of June, 1899; were you in Alaska?
A. Yes, sir; on McKinley creek.
Q. Where were you in the month of October, 1898?
A. At Pleasant camp.
Q. State where Pleasent camp is.
A. It is about eight miles above Porcupine, on the Dalton trail.
Q. That place where you say you were on this side of that creek there?
A. On the other side.
Q. Just about the boundary line?
A. Yes, sir.
Q. Who was there at that time with you?
A. James Hanson, Dan. Sutherland, Chisholm, Hawes, and Cahoon.

Q. What were you doing there?
A. I was engaged by William Chisholm, building a storehouse.
Q. You and Chisholm?
A. Yes, sir.
Q. In whose employ?
A. Working for Chisholm; he was building a house for Jack Dalton.
Q. Is that the first time you met Cahoon?
A. Yes, sir.
Q. Where did you first meet Cahoon?
A. On the steamer Alice Blanchard, coming from Seattle.
Q. What was Cahoon doing there?
A. Working for Chisholm.
Q. How long had he been working for Chisholm?
3 A. About two weeks.
Q. Where did he come from prior to that?
A. From Alder creek.
Q. State to the jury what occurred at that time with reference to location of any claims.
A. It was decided that they should go over prospecting on Porcupine river. I and Chisholm couldn't get away.
Q. Who was to go prospecting?
A. James Hanson, Dan. Sutherland, and Mr. Cahoon, and Mr. Cahoon suggested that we give him a power of attorney and he would locate for us, and we furnished all the provisions and they started out and went over and made the locations for us on the sixth.
Q. Mr. Hall, will you look at that, please?

Counsel for the plaintiff handed the witness a paper.

A. That is a power of attorney.
Q. You read that over?
A. Yes, sir.

Counsel for the defendant objected to the testimony of the witness as to what the paper handed him is for the reason that it is a conclusion of the witness.

By the COURT: I suppose it is for identification.
A. That is a power of attorney written by C. P. Cahoon; he wrote it himself and we signed it, and it was witnessed by Dan. Sutherland and James Hanson.
Q. Whose signature is that?
4 A. Mine.
Q. Is that Mr. Chisholm's signature?
A. Yes, sir.
Q. This is an instrument written under that agreement, as a power of attorney by which he was to locate claims for you?
A. Yes, sir.
Q. Who wrote this instrument?
A. Mr. Cahoon.
Q. These signatures are yours and Mr. Chisholm's?
A. Yes, sir.

Counsel for plaintiff offered in evidence the power of attorney which has just been identified by the witness.

The same was admitted in evidence without objection and marked Plaintiff's Exhibit A and read to the jury as follows:

"Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasent camp, British Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. P. Cahoon, of Pleasent camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead to locate a mining claim in the Territory of Alaska.

In testimony thereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.

PETER HALL. [SEAL.]
WM. A. CHISHOLM. [SEAL.]
WM. S. HAWES. [SEAL.]

Signed, sealed, and delivered in the presence of—
DAN. SUTHERLAND.
J. HANSON."

5 Q. After you had given this power of attorney to Mr. Cahoon what then occurred?

A. Well, they all started for the Porcupine—that is, Cahoon, Hanson, and Sutherland.

Q. On what date?

A. About the 4th of October, '98.

Q. When did you next see Cahoon again?

A. On or about the eight-.

Q. Who was with him at that time?

A. Chisholm, Hanson and Dan. Sutherland.

Q. Where did you see him on the eighth?

A. At Pleasent camp.

Q. He had returned at that time?

A. Yes, sir.

Q. What, if any, conve-sation occurred with him at that time relative to anything that he did during his absence?

A. He stated that he found good prospects there, and that he staked us.

Q. What did he say he staked?

A. He said he staked us on McKinley. He said, I staked Chisholm first and you, Hall, next.

Q. Who was present at the time he said that?

A. Dan. Sutherland and William Chisholm was present when he said that.

Q. How long did you remain then at Pleasent camp?

A. We left the next day about noon.

Q. When was the first time that you went upon these claims?

A. On or about the 20th of October—the 19th or 20th.

Q. That same year?

A. Yes, sir.

Q. What, if anything, in the way of a location notice did
6 you find on that claim from the statement made to you by Mr. Cahoon?

A. I found my location notice on the stake there, and I copied it as near as I could.

Q. Look at that instrument. (Counsel hands witness a paper). Is that a copy made from the tree or post that that was on?

A. Yes, sir.

Q. That is your handwriting?

A. Yes, sir.

Q. It was made the first time you went up on the claim, on or about the 20th of October?

A. Yes, sir.

Q. You filed this for record, did you?

A. Yes, sir.

Counsel for the plaintiff offered in evidence the location notice which has just been identified by the witness.

Counsel for the defendant objected to the introduction of the location notice in evidence for the reason that the notice is signed by Hall himself and not pretended to be a location notice signed by Cahoon under any power of attorney for Hall, and for the further reason that the location notice is to- indefinite and uncertain.

The objection was overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

7 The location notice was admitted in evidence, marked Plaintiff's Exhibit B, and read to the jury as follows:

"*Location Notice.*

Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1,500 ft. running with the creek and 300 ft. on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm claim on about 1,800 ft. from the first falls above the Porcupine river, in the district of Alaska.

PETER HALL, *Locator.*

Witness-:
J. HANSON.
D. SUTHERLAND.

(Endorsed:) Peter Hall location, McKinley Cr. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded in Book 6, Placers, on page 107, of the records of said district. Norman E. Malcolm, district recorder."

Q. Now, Mr. Hall, after you went down there and saw that notice and made that copy and had it recorded, that was along about the 20th of October?

A. Yes, sir.

Q. When did you next go upon that claim?
A. The next about May of this year.
Q. The winter season had come on in the meantime and
8 the work had shut down?
A. Yes, sir.
Q. What, if anything, else did you see upon that stake relative to location notice?
A. There wasn't anything else on that stake; about three hundred feet below there was stakes.
Q. Was there any other notice on this stake except yours?
A. Yes, sir; Chisholm's notice was on it, on the other side of the stake.
Q. Did you see that?
A. Yes, sir; I did.
Q. On the same stake?
A. Yes, sir.
Q. On the opposite side?
A. Yes, sir.
Q. Look at that. Is that your handwriting?
A. That is not my handwriting; no, sir.
Q. Do you know who made this copy?
A. Mr. Chisholm.
Q. Then there was another notice on that besides your own; that was Mr. Chisholm's?
A. Yes, sir.
Q. Now, when you went on there this year what did you do; who went on with you? Tell the jury what you did on these claims.
A. We went up there.
Q. What time?
A. It was about May, I should say. I have forgotten the date; the last of April or the first of May.

(By Judge WINN:)

Q. What year, Mr. Hall, please?
A. This year.
9 Q. Well, who was with you?
A. James Hanson, William Chisholm, and myself and Dan Sutherland.
Q. What did you do?
A. We cut trails from Porcupine and cut trails up the creek to make it possible to get provisions up. The trail was along three or four claims, and done considerable work to make it possible to get in provisions.
Q. What else did you do?
A. We built a flume about two thousand feet long to get water to work the mine, and we worked the mine most of the summer and done considerable work all over.
Q. In opening it up?
A. Yes, sir.
Q. Now, this claim that was known as the Hall claim, you represented that by this work, did you?

A. Yes, sir.
Q. Did you ever abandon that claim?
A. No, sir.
Q. Do you still claim it under the original location made by Mr. Cahoon as your agent?
A. Yes, sir.
Q. Did you ever authorize him or anybody else to abandon that claim for you?
A. No, sir.
Q. Did you ever give any written instrument to Mr. Cahoon other than this power of attorney in reference to that claim?
A. No, sir.
Q. That claim, as I understand, is in the Porcupine mining
10 district, district of Alaska.
A. Yes, sir; it is.
Q. Now, after the location of these claims state if all these gentlemen agreed to work these claims together as a partnership and own them as such.
A. We did.
Q. And you own them as such now?
A. We do.

(By Juror GRANT:)

Q. This location notice that has been submitted, it is a copy of the notice on the claim?
A. Yes, sir.

(By Juror GRANT:)

Q. Did that notice there have your signature on it?
A. Yes, sir.

Cross-examination by Judge WINN:

Q. The first time, Hall, then, that you met Cahoon was when he first came to Alaska on the steamer coming from Seattle?
A. Yes, sir.
Q. How many of the other parties who now constitute either the McKinley Creek Mining Company or the Alaska United Mining Company were aboard that steamer?
A. Well, of the other parties there was four or five—four of them, I think.
Q. That was the first time you became acquainted with Cahoon?
A. I met him on the boat.
Q. Had you seen him in Seattle before coming up?
A. No, sir.
Q. Did you or he or any of the other parties after you ar-
11 rived at Juneau go any place together?
A. No, sir.
Q. Where did you leave Cahoon, then?
A. We started at Haines mission.
Q. Did you stop at Haines mission?

A. Yes, sir.
Q. How many did you leave there at Haines mission?
A. We all started up the trail; we got ahead of them, most of them, I guess.
Q. Did you start from there together to explore the country?
A. Yes, sir; not together, but in separate parties.
Q. Had you had any talk on board the steamer with any of these other parties as to what you parties intended to do?
A. I simply knew them on the boat; I don't remember as I did.
Q. You wouldn't be positive as to whether you didn't have a conversation with the McKinley Creek parties about gold-seeking up here?
A. We talked the same as strangers would on a boat about mining and nothing further.
Q. Did you have any talk, or will you be positive on that proposition when you got to Haines mission?
A. We all talked about going up the trail.
Q. What year was that, what time?
A. That was March of '98.
Q. This claim that you claim was located in October, '98?
A. Yes, sir.
Q. Who started with you when you left Haines mission?
A. Myself and my partner, Dr. Graham and myself.
Q. Did Cahoon or any of his party go up the trail?
12 A. I presume they did; yes, sir.
Q. Did you separate from Cahoon, his men or his party, or did you go together?
A. They got ahead of us. They go further up the trail.
Q. When did you next meet Cahoon?
A. At Alder creek.
Q. In the Porcupine mining district?
A. No, sir.
Q. On the British Columbia side?
A. On the other side.
Q. How much did you see of him there? How long were you together?
A. We were not together.
Q. Did you see him?
A. Yes, sir.
Q. Have any conversation with him?
A. Yes, sir.
Q. Talk about the discovery of mines then?
A. Yes, sir; more or less about mining.
Q. You and Dr. Graham were together?
A. We started in together, and he came out before that time.
Q. How long did you remain there on the British Columbia side?
A. About two weeks.
Q. Who else was with Cahoon?
A. Hawes was with Cahoon.
Q. Was any of the rest of the McKinley Creek Mining Company parties with Cahoon?

A. No, sir.

Q. Did any of the rest of the McKinley Creek Mining
13 Company parties start up the trail?

A. Yes, sir.

Q. Who were they?

A. Lewis, Leitch, West, and Hawes.

Q. When you met on the Columbia side, Cahoon and Hawes were together?

A. They were partners, I guess.

Q. What became of Lewis and the other parties?

A. West was with him.

Q. Where were the other parties that started up this trail?

A. Scattered all over there.

Q. How long did you remain at this point on the British Columbia side with Cahoon and these parties?

A. On the creek there about two weeks.

Q. Encamped together?

A. No, sir; not encamped together.

Q. You met frequently?

A. Yes, sir; quite frequently.

Q. Then after you broke camp where did you meet next?

A. Pleasent camp.

Q. What time was that?

A. About the middle of September.

Q. '98?

A. Yes, sir.

Q. How long did you remain there?

A. I was working there for Mr. Chisholm. Mr. Chisholm hired Cahoon and his partner to work for him.

Q. Who do you mean by Cahoon's partner?

A. Hawes.

Q. Now, Mr. Hall, how long did you work together there at Pleasent camp?

14 A. About two or three weeks.

Q. Hawes and Cahoon were there?

A. Yes, sir.

Q. Was Lewis or any other of the parties forming the McKinley Creek Company there?

A. No, sir.

—. ——?

A. Most of them around there.

A. Not working for Chisholm?

A. No, sir.

Q. Were you working for Chisholm all the time that Cahoon and Hawes worked for Chisholm?

A. Yes, sir.

Q. How long was it that Hawes and Cahoon worked there before they started out with Hanson and Sutherland?

A. Two or three weeks, I guess.

Q. I want you to give the exact place, the parties present, and the

conversation you had with Cahoon when he with Sutherland and Hanson started out as this exploration party.

A. When the power of attorney was written we were in the cook-house.

Q. Cahoon asked you to let him have the power of attorney?

A. Yes, sir.

Q. Had you talked about staking with Cahoon before this conversation took place?

A. No, sir; nothing.

Q. You had talked about prospecting that creek, but nothing was said about staking. Had you contemplat*ing* going yourself?

A. Yes, sir; I was figuring on going.

15 Q. When did you make up your mind you couldn't go yourself?

A. Two or three days before this time.

Q. Before the time of the execution of the power of attorney?

A. Yes, sir.

Q. The first time you had any conversation with Cahoon about locating you was about the time the power of attorney was executed?

A. Yes, sir.

Q. What else or what other conversation took place?

A. Chisholm and myself furnished the provisions.

Q. What conversation took place?

A. Nothing; we gave him our power of attorney and he staked the claims.

Q. What conversation took place about the provisions?

A. We agreed to furnish the grub.

Q. Did that conversation take place before the power of attorney was executed or afterwards?

A. About the same time.

Q. Tell the conversation.

A. I couldn't give the exact words.

Q. Give the substance.

A. I stated it.

Q. What day did Cahoon and these parties leave?

A. On the 4th of October, '98.

Q. The power of attorney was made out on the date it bears?

A. Yes, sir.

Q. Now, in the meantime had you had any further conversation with Cahoon or Hawes or any of these parties about mining claims?

A. I don't understand.

16 Q. Before Cahoon left did you have any further conversation with Cahoon or Hawes about mining claims?

A. I just stated that we talked about going over to Porcupine.

Q. After the power of attorney was executed?

A. We talked of going before.

Q. I said after that was executed?

A. He said that he would locate for us.

Q. Was there any further conversation had after that before Cahoon left?

A. No, sir; he started right out.
Q. How long afterwards?
A. As soon as he could make up the bundles.
Q. Three or four hours after it?
A. Two or three hours.
Q. Will you swear positive that Cahoon didn't have *some* outfit and grub himself?
A. He didn't have a thing.
Q. Where was the stuff that he got the grub from?
A. I had it in a cache and Mr. Chisholm had some.
Q. What do you mean by cache?
A. Going in the spring I had left some stuff there and had built a cache and left provisions there.
Q. Some provisions that you had carried in there in the spring?
A. Yes, sir; that same year.
Q. This was in October?
A. Yes, sir.
Q. Then you say that you furnished out of this cache these provisions furnished him; do you remember how much provisions you furnished him?
17 A. I don't remember the exact amount we furnished; enough to last a week or ten days.
Q. Did you deliver it yourself?
A. Yes, sir.
Q. Do you remember what you gave him?
A. Not the exact stuff—the necessities, such as a prospector carried.
Q. Can you tell what you gave him?
A. Flour and rice and other stuff.
Q. How much you don't remember?
A. Enough to last about ten days.
Q. When did you next see Cahoon?
A. On the 8th.
Q. Of what year?
A. October, '98.
Q. Who was with him?
A. James Hanson and Dan. Sutherland.
Q. What was the first conversation had?
A. The first conversation was that he had staked claims for us.
Q. Tell the exact language he used.
A. He said he had staked for us, and to show no partiality I have staked Chisholm first and you next.
Q. Was Hackley present?
A. No, sir.
Q. Hawes present?
A. No, sir.
Q. Were any of the McKinley Creek parties present?
A. No, sir.
Q. The only parties present was Cahoon, Hanson, and Sutherland?

A. Hanson wasn't right there; he was in the neighborhood.

18 Q. Where did it take place?

A. Back of the building.

Q. What is it, a barn?

A. A storehouse.

Q. Do you know whether any one else was in hearing distance?

A. Nobody else.

Q. Will you swear that Hawes wasn't there and he didn't hear that?

A. He wasn't there.

Q. You swear positive to that?

A. Yes, sir.

Q. Was anything else said?

A. No, sir.

Q. You all went on with your work?

A. Yes, sir.

Q. Did Cahoon come back to work there?

A. No, sir.

Q. When did you next have a conversation with Cahoon?

A. We talked off and on until he left there.

Q. Can you tell anything else that was said before Cahoon left?

A. There was nothing else said; simply talked about the claims and about going to prospect them.

Q. That was the general run of your conversation?

A. Yes, sir.

Q. How long did Cahoon remain there?

A. We left the next day.

Q. Did you go with them?

A. Yes, sir.

Q. Did Chisholm?

A. Yes, sir.

19 Q. Name all the parties.

A. Chisholm, Hanson, Sutherland, and Hawes.

Q. Where did you start out for then?

A. We were going down to record our claims down here.

Q. Coming down to Juneau to record them then?

A. Yes, sir.

Q. How far did you get on this journey?

A. We stopped at Boulder creek.

Q. That in the Porcupine district?

A. Yes, sir.

Q. All together?

A. Yes, sir.

Q. How long did you stay on Boulder creek?

A. We left the next morning.

Q. Where did you go?

A. Camp Sunshine.

Q. Who did you meet there?

A. Joe Buckler and his partner.

Q. Anybody else?

A. His partner.
Q. He and his partner and your party were there then?
A. All except Cahoon and Hanson; they went over to the creek.
Q. Did Cahoon stop at Sunshine camp with you?
A. No, sir; he went over to the creek.
Q. He and who else?
A. He and Hanson.
Q. And the rest came down to Sunshine?
A. Yes, sir.
Q. Where was it you next met Cahoon?
20 A. At Camp Sunshine.
Q. What day was that?
A. About the 12th.
Q. Of October?
A. Yes, sir.
Q. State to the jury who was present at Camp Sunshine at this time.
A. We were all there.
Q. Who all?
A. Chisholm, Hanson, Sutherland, and these other parties that constitute that company.
Q. Was Lewis Wooden and Hackley there?
A. Hackley wasn't there.
Q. Was West?
A. Yes, sir.
Q. Hawes?
A. Yes, sir.
Q. Leitch?
A. Yes, sir.
Q. Cahoon?
A. Yes, sir.
Q. That was on or about the 12th of October?
A. Yes, sir.
Q. Did you have any conversation there at this time with these parties present about any claim that you had on McKinley creek which you claimed that Cahoon had staked out for you?
A. Cahoon told me that they had overstaked us.
Q. Who had?
A. He didn't give the names; he said the parties had.
Q. Cahoon told you?
21 A. Yes, sir.
Q. Did he tell you who jumped the claim?
A. These other parties; he said the boys had.
Q. The boys had jumped your claim?
A. Yes, sir.
Q. Did you testify to that before when you testified in this case?
A. Yes, sir.
Q. Positive of it?
A. Yes, sir.
Q. Who was present?
A. Nobody.

Q. What else was said?
A. I objected and kicked on it some, as anybody would.
Q. Can you tell the language you used?
A. Not the exact language; I didn't write it down.
Q. You can't remember it, either?
A. I can't remember what it was.
Q. Was anything else said by you and Cahoon when you were together there?
A. I told him I wanted that claim, and he said that Lewis had staked us up on the creek, and I kicked and I wouldn't record that claim up the creek.
Q. Was anything further said?
A. Nothing particular that I can think of.
Q. How long did you stay in Sunshine camp?
A. About a day and a half.
Q. Did you at any other time during that day and a half have any further conversation about your claim?
A. I didn't know anything about it until Cahoon came; we came down and then we waited for them to come down.
22 Q. How long did Cahoon and Hawes remain there at Sunshine camp at this time?
A. Cahoon and Hawes?
Q. Yes, sir.
A. Why, Cahoon remained there about an hour or two hours.
Q. That is all that was said about this claim of yours during Cahoon's two or three hours' stay?
A. I kicked on the restaking.
Q. You objected to Cahoon about it?
A. Yes, sir.
Q. Did you go to Lewis and these other parties?
A. They were al- together then; we talked inside and outside.
Q. You did have other conversations other than the conversation you said you and he had alone? Who else was present at any other conversation about this mining claim?
A. The boys were all present—all the parties.
Q. The parties that constitute the McKinley Creek Mining Company?
A. I think so, except Hackley.
Q. How many who constitute the Alaska United Mining Company?
A. They were all present.
Q. Was Jack Dalton there?
A. No, sir.
Q. Who was there?
A. James Hanson, Chisholm, and myself.
Q. The only conversation was a general kick that somebody had jumped your claim?
A. I made a kick to Cahoon, and the boys heard it.
Q. Did you find out before you left Camp Sunshine who had jumped your claim?

23 A. No, sir.

Q. Did you proceed on down to Juneau to have your notices recorded?

A. No, sir.

Q. Did you ask Cahoon at that time to make you out a location notice of the claim which you first understood, and the one in controversy in this case was located for you under your power of attorney?

A. I didn't see Cahoon again.

Q. What did you leave Sunshine camp for, and where did you intend to go?

A. We went down to the harbor.

Q. Did any conversation take place at this time about Mr. Cahoon going back on the creek to stake a claim?

A. Where was this?

Q. Sunshine camp.

A. He was going back to rectify the staking, I suppose.

Q. Of what?

A. These claims; we were to have our original claims.

Q. Haven't you repeatedly testified that he was going back to stake out your claim?

A. No, sir.

Q. Did you send him back?

A. No, sir.

Q. Did you tell him to go back?

A. No, sir.

Q. You don't know what Cahoon went back for?

A. To rectify the staking.

Q. What was there to rectify?

A. I don't know about mining.

Q. What conversation took place between you and Cahoon?

24 A. I don't remember the exact words.

Q. Do you remember the substance?

A. He was going back to rectify the staking.

Q. Did you ask him?

A. No, sir.

Q. What did you say about it?

A. I kicked because they had overstaked us.

Q. How was he to rectify that; what do you understand Cahoon was going back for?

A. To rectify the staking; we was to have the original claims.

Q. Had you heard any stakes had been pulled up?

A. No, sir.

Q. When Cahoon met you at Pleasant camp he told you he had staked a claim?

A. Yes, sir.

Q. And Cahoon was going back to restake the claim?

A. He was going back to rectify the staking; he said the boys had overstaked us.

Q. Who told you that?

A. Cahoon.

Q. And he was going back for what?
A. To rectify the staking.
Q. Mr. Hall, how far was it from Sunshine back to where these claims in controversy are located?
A. Seven or eight miles.
Q. A good road or a rough road?
A. Most of the way a good road.
Q. Was it at that time?
A. A part of the way very good.
25 Q. And part of the way it wasn't; there hadn't been any trail cleared out?
A. There was a trail more than half of the way.
Q. Did you have a conversation there, sir, in the presence of all these parties you have just mentioned, and wasn't the only controversy that arose at Sunshine camp you was afraid that because Lewis had staked your claims and he didn't have the power of attorney, and that you was afraid the staking was illegal, and that Cahoon, in the presence of these parties you have just mentioned, offered, and it was agreed between you there, that Cahoon was to go back up the creek and restake the upper claims, and he and Lewis went back for the purpose of staking them for you?
A. No, sir.
Q. Did any such conversation take place at that time?
A. No, sir.
Q. Where did Cahoon get the provisions?
A. From Joe Buckman's camp.
Q. You had no interest in it?
A. No, sir.
Q. Or Chisholm had none?
A. No, sir.
Q. Did they fix up and leave there before you left Sunshine camp?
A. We left there about the same time.
Q. Who left first?
A. Why, I think we did; just about the time they were making up their bundles.
Q. Who went with Cahoon?
A. Lewis.
26 Q. You hadn't heard up to this time who had jumped the claims?
A. No, sir.
Q. You know some of the McKinley Creek parties; they were all there except Hackley?
A. Yes, sir.
Q. You staid in Sunshine camp about a day and a half?
A. They were there about an hour or two hours.
Q. Hawes was there about a day and a half?
A. Yes, sir.
Q. The other parties was there from an hour and a half to two hours, and you never made any inquiry of Cahoon or any inquiry of these parties who had jumped your claim?

A. No, sir.

Q. Didn't you offer to furnish blankets for Cahoon and Lewis to go back up there and restake these claims, and they never got blankets from you or Chisholm to go back up there?

A. No, sir.

Q. Either you or Hanson?

A. Yes; I think they did.

Q. Did you hear that conversation about getting these blankets from Hanson?

A. Yes; I think so. Their blankets had gone down on the horses and Hanson had his blankets with him.

Q. Didn't you offer or Chisholm offered to pay Cahoon for going back up there?

A. No, sir; I didn't offer to pay him to go back.

Q. Didn't you in the presence of these parties forming the
27 McKinley Creek Mining Company offer to pay Cahoon to go back up there and stake these claims for the reason that you thought by reason of Lewis staking them and he having no power of attorney they were not good?

A. I didn't offer to pay him; no, sir.

Q. You are positive of that?

A. Yes, sir.

Q. You knew he was going back there and was going to take these blankets up there?

A. Yes, sir.

Q. You knew one of the McKinley Creek mining parties had jumped your claim?

A. Yes, sir.

Q. And you didn't know which one?

A. No, sir.

Q. You didn't know whether the stakes were proper or not?

A. He staked the claim.

Q. You didn't know what then Cahoon was going back up there for?

A. He was going back to rectify the staking.

Q. He told you at Camp Pleasant that he had staked your claim?

A. Yes, sir.

Q. Didn't you or Hanson or Chisholm or some one of your party go to this man Buckman's camp and get some food?

A. We told him to go there.

Q. Didn't you go and get the food yourself for these parties to go back up there?

A. I told him to take the grub, and if I see Buckman I would make it all right with him. Buckman had gone down to Klaquan.

28 Q. You told him you would make it all right with Buckman?

A. Yes, sir; I told him I would see Bockman the next day and make it all right with him.

Q. Now, sir, when you testified before in this case, when I put this question to you, "Why he, meaning Cahoon, went back," you answered that question, "I couldn't say."

A. No; I testified he went back to rectify the staking.

Q. Did you upon the examination before ever mention one syl-lable of testimony that Cahoon was going back there to rectify the staking on the two claims in controversy in this case?

A. I am certain that I must have done it.

Q. Didn't you swear positive in answer to the question—when I asked you this identical question you stated that you didn't know what they went back there for, referring to Lewis and Cahoon. You said, I couldn't say. Answer yes or no.

A. I answered it that way.

Q. On a trial of this case?

A. Yes, sir; I answered that way.

Q. Now, you know what he went back there for? Why was it on the previous examination, when I put that question to you, why did you answer that question that way, sir?

A. I didn't think then.

Q. After mature recollection for six months you answer def-erently. You answered then that you didn't know what Cahoon and Lewis went back for?

A. I have found out what they done. They went back to rectify the staking.

Q. Then what you stated on the previous examination, on
29 the trial of this case, you didn't know what Cahoon and Lewis went back for—is that true, or is what you are testifying to now true?

A. I couldn't answer that question.

Q. You left there, then, after you got this grub for him and he had taken Hanson's blankets and Cahoon and Lewis had left, you left Sunshine camp without ever knowing as to whether or not it was Hackley or McConaghy or any of these six or seven parties had jumped your claim?

A. I didn't find it out.

Q. You made no effort to find it out?

A. No, sir; we left there right away.

Q. Why didn't you ask Mr. Cahoon to write you out a location notice?

A. I expected to see him again.

Q. When you left Sunshine camp where did you go?

A. Down to Pyramid Harbor.

Q. Had you ever had any conversation with Cahoon about forming a company and going in with him?

A. Nobody but Cahoon.

Q. Did you have any talk with any of the rest of the parties there at Sunshine camp about that?

A. Forming a company; no, sir.

Q. Isn't it fact that in the presence of all of these McKinley Creek mining parties at this camp at Sunshine you absolutely talked over between you parties, you among the rest, of going into a company to work these claims?

A. Mr. Cahoon made the arrangement without our authority.

Q. Did you have any conversation yourself and consented
30 to it and agreed to it in the presence of these McKinley Creek parties, except Cahoon?

A. No, sir; we didn't.

Q. Now wasn't this matter explained, Mr. Hall, before you left, and didn't you know that Hackley and McConaghy had located the two claims now in controversy, the one you claim to be your claim?

A. No, sir; I did not.

Q. You made no effort to find it out? Isn't it a fact, and you all knew it, and isn't it a fact that it was perfectly agreeable because Hackley and McConaghy and these other parties, and it had been agreed upon by you and the others present that these two claims in controversy, including the two further up the creek, they were all to go into this arrangement of the company; you understood that?

A. No, sir.

Q. Now, when you left Sunshine camp you started on down to Pyramid Harbor for what purpose?

A. On the way down——

Q. For what purpose?

A. We were going down to record our claims.

Q. Had you any location notice made out?

A. I suppose Cahoon would come down; he was coming down to Pyramid Harbod.

Q. Wasn't there an understanding before you left this camp as to where yo- would meet Cahoon?

A. He said he would be down to the harbor a day or a day and a half behind us.

31 Q. You were all on the way down for the same purpose, to record your claims at Pyramid Harbor?

A. No, sir; we were coming on down to Juneau.

Q. Did you stay there and wait until Cahoon came?

A. No, sir.

Q. How long did you stay there?

A. I waited about a week.

Q. Where did you go then?

A. I went up the creek.

Q. With whom?

A. Chisholm, Hanson, Dalton, myself, and Sutherland.

Q. What for?

A. Going up to go on the ground.

Q. What ground?

A. Out claim.

Q. You didn't wait for Cahoon to make out the notice?

A. No, sir.

Q. Why?

A. I agreed to go up to Pleasant camp and wait for him and then go to Juneau, and I concluded to go back up and go on the ground.

Q. What ground?

A. My claim.

Q. What reason had you for going on the ground?

A. I wanted to see the claim.

Q. And you went back on the ground?
A. Yes, sir.
Q. What did you find?
A. I found the old stake.
Q. The one that Cahoon first put there?
32 A. Yes, sir.
Q. You say you went there and examined that stake and copied off a notice, of which this is a copy, do you?
A. Yes, sir; a copy as near as possible of that notice.
Q. What was that notice written on?
A. Written on a snag with a blue pencil. It had rained up there and some words I couldn't make out.
Q. You wouldn't swear positive that is a copy?
A. As near as I could make it out.
Q. You couldn't, as you stated, make out every word on there?
A. Not exactly.
Q. Was your name signed on that location just the same as it is signed on this notice?
A. Yes, sir.
Q. That way?
A. His name was on it, too.
Q. Then this notice isn't an exact copy of that statement?
A. As near as possible, besides his name.
Q. That was what date, about the 20th?
A. I think it was the 19th or 20th.
Q. You were up there about that date?
A. I stated about that time.
Q. The name signed there on the notice is the same one as this?
A. No name was on the notice.
Q. What other name was on the notice?
A. Cahoon's name. I copied it as near as I could.
Q. Then, Mr. Hall, there hadn't never been change of the
33 original staking made of this claim made by Cahoon?
A. No, sir.
Q. You made this out about the 20th of October, and it was dated on the 6th day of October?
A. Yes, sir.
Q. Did you ever see Cahoon and ask him to make out a location notice for you?
A. Not until after I had recorded.
Q. What did you do there?
A. I went on the ground and prospected and panned it.
Q. Did you see any location notice of McConaghy and Hackley?
A. Yes, sir.
Q. Did you see a location notice of Chisholm?
A. Yes, sir.
Q. Where were these notices of Hackley and McConaghy?
A. Written on a tree.
Q. On the same snag?
A. No, sir.
Q. How far from it?

A. About three hundred feet below, one stake.
Q. Did you look for any other stakes?
A. Yes, sir; I went up the creek and saw all the stakes.
Q. Did you see the stakes of the McConaghy claim?
A. Yes, sir.
Q. That was there when you got there?
A. Yes, sir.
Q. How long did you stay there on the creek?
A. About two days, two or three days.
Q. Where did you go then?
A. Up to Pleasant camp.
34 Q. Who was there with you? Did Dalton go on this ground?
A. Yes, sir.
Q. Hanson, yourself, and Sutherland?
A. Yes, sir.
Q. And all went back to Pleasant camp?
A. Not all. Sutherland, Chisholm, and Hanson staid on the ground. I went back to Pleasant camp.
Q. Dalton went back to Pleasant camp?
A. Yes, sir.
Q. Where did you meet Cahoon after that?
A. Here at Juneau.
Q. How long?
A. About two weeks and a half, I should say.
Q. Did you have any conversation with him about it then?
A. No, sir.
Q. Never said a word to Cahpon about it?
A. I don't just remember what we said. There was nothing particular to mention in regard to these claims.
Q. When did you next see Hackley and McConaghy after you left Sunshine camp?
A. I met them down at the harbor.
Q. When you was up there did you put any notice on the claim?
A. I copied the notice that was on the claim.
Q. Did you put any notice on yourself?
A. No, sir.
Q. You didn't put up any notice or any stakes at all?
A. No, sir.
Q. Did you put up any notice yourself or any stakes while you were up there at that time?
35 A. No, sir.

(By Juror CLARK:)

Q. Was McConaghy and Hackley furnished with grub on October 4th?
A. No, sir; they had their own provisions.
Q. You never had anything to do with McConaghy and Hackley?
A. No, sir.
Q. You had never been in partnership with them at all?

A. No, sir.

Q. Now, Mr. Hall, did I understand you to say that when you went up to these claims in controversy, about the 20th of October, you didn't put up any kind of a notice or any stake on these claims or in that vicinity?

A. We designated the upper-end stake; that is all.

Q. What kind of a notice did you put on that upper-end stake?

A. Just designated the upper end; set a kind of a notice there.

Q. What kind of a notice did you put on it?

A. It was a duplicate of this notice as near as possible.

Q. When you went up there, then, in October, on this claim that is now in dispute between you and McConaghy you did put up a notice similar to this notice that you offered in evidence?

A. Something.

Q. Signed your name to it?

A. Yes, sir.

Q. What date did you put on it?

A. Just the same.

Q. When you say you left Sunshine camp at the time Lewis and Cahoon went back up McKinley creek, you waited about a week for Cahoon to appear, then you and Dalton, Hanson and
36 Sutherland and Chisholm—didn't Hawes start back with you up that way?

A. Yes, sir.

Q. You people started back to see if you couldn't find Cahoon and find out what had become of him?

A. Yes, sir.

Q. How far did Hawes go with you on this trip?

A. Why, he branched off there where the trail starts over the mountain. He took that trail to see if he couldn't find him coming down that way; he and Chisholm took that trail.

Q. That is the same trip that you, Dalton, Hanson, Sutherland, Chisholm continued back up to McKinley creek and put up this notice on the McConaghy claim, and you got a copy of the notice which you offered in evidence in this case?

A. The same trip.

Q. Hawes didn't go back that far with you?

A. He went up to Pleasant camp.

Q. Now, Mr. Hall, isn't it a fact when Cahoon returned there—when Cahoon came back up to Pleasant camp, at the time you say the conversation took place about his telling you he had staked you, before you parties left up there, you and Cahoon, Hawes, Chisholm, and Sutherland, on that trip and while Cahoon was at Pleasant camp, didn't you have a conversation with him about the time he told you he had located you, about going into partnership and forming a company?

A. He spoke of it.

Q. That was agreeable to you at that time?

37 By the COURT: I don't see how that is material.

By Judge WINN: The fact is I want to show they had a

partnership and it was always understood at all times, and he drew out for certain reasons and he runs back up there and stakes these claims, and also the witness testified this morning and has detailed a part of the conversation, and I am undoubtedly entitled to the whole conversation.

By the COURT: I don't think it is material.

Counsel for the defendant excepted to the ruling of the court.

Redirect examination:

Q. Mr. Hall, did you ever authorize Mr. Lewis to make any location for you?

A. No, sir.

Q. You never accepted any location that he made, did you?

A. No, sir.

Q. You stood by this first location as made by Mr. Cahoon for you?

A. Always.

Q. This notice of location is as near as you could make a copy?

A. Yes, sir.

38 WILLIAM A. CHISHOLM, called on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Where do you reside?

A. Generally in Washington.

Q. How long have you been in Alaska?

A. About two years now.

Q. Where were you along about October 4-h, '98?

A. Pleasant camp.

Q. Up near the boundary line?

A. Yes, sir.

Q. Who was with you there at that time?

A. C. P. Cahoon, James Hanson, Dan. Sutherland, Peter Hall, and W. S. Hawes.

Q. What were you doing there?

A. I had a contract to build a house for the Dalton Express Company.

Q. Who was working with you there?

A. The parties I just named.

Q. State if at that time you had any transaction with Mr. Cahoon in the way of locating claims.

A. In the first place, I was working there and had these men working for me; that is a short distance this side of the boundary line; we were working there, and about the 4th of October we talked of prospecting, and as we all couldn't go at that time it was agreed that three of our party be sent out and the balance remain to finish up.

Counsel for the defendant objected to the witness relating
39 what was agreed for the reason that the same is a conclusion of the witness.

By the COURT: Yes; relate as near as you can what was said.

A. On that date we appointed—or rather Mr. Cahoon expected to do the work for us as our attorney, and he wrote out the paper and we signed it.

Q. Look at that paper. Is that your name signed there?

A. Yes, sir.

Q. Your handwriting?

A. Yes, sir.

Q. Who wrote that?

A. C. P. Cahoon.

Q. That is the power of attorney?

A. Yes, sir. After giving him his power of attorney we grub-staked them.

Q. Who grub-staked them?

A. Peter Hall and myself. I bought part of the grub from Jack Dalton's store and Peter Hall had the rest in his cache, so at that time Dan. Sutherland also said that he would see that we was properly staked, so they started out.

Q. Who started out?

A. C. P. Cahoon, Dan. Sutherland, and James Hanson, and they started down into what is the Porcupine mining district, and on the 8th they returned very much pleased, and they also had some nice nuggets of gold, and Mr. Cahoon said to us that he had staked all the boys, and he said, To show you that I *show you that I* showed no partiality, he said, I staked for you first, mentioning my name, and Peter Hall next, and Hawes next, and so on up the creek. I said That is all right. We accepted of his work as done.

Q. Who was present at that conversation?

A. Dan. Sutherland.

Q. Anybody else?

A. I didn't look; the boys was standing around.

Q. That occurred at Camp Pleasant on the 8th of October?

A. Yes, sir.

Q. Where did you proceed from there?

A. We then made preparations to go down to the harbor to record our claims, and we went down to Boulder creek the next day and stopped over night, and the next morning we, in the first place, expected to meet the boys there, and, not meeting them, we proceeded on to Sunshine, and Mr. Cahoon and Hanson started up the Porcupine creek, and we went on to Sunshine, and they met the other party up there some place, and we turned with them, and we found out—Mr. Hall, I think, told me——

(By Judge WINN:)

Q. Was Mr. Cahoon present?

A. He was present when he returned.

(By Judge WINN:)

Q. When the conversation took place?

A. No, sir.

Counsel for the defendant objected to the witness relating the conversation for the reason that the same is not proper and not binding upon the defendant company.

Objection sustained by the court.

Q. When did you go on the ground yourself?

A. About the 19th of October.

41 Q. Who was with you then?

A. Peter Hall, James Hanson, Dan. Sutherland, and Jack Dalton.

Q. What in the way of a notice, if anything, did you find on the claim?

A. We found the notice that we had recorded. It was partly blotted, I think; partly chipped off. That is the way I took it to be.

Q. You copied it off the best you could?

A. Yes, sir; the best we could.

Q. Look at that notice.

A. Yes, sir; that is it.

Q. That your handwriting?

A. Yes, sir.

Q. That is the copy of the notice?

A. Yes, sir.

Q. That you recorded here?

A. We recorded in the Porcupine district.

Counsel for the plaintiff offered the copy of the notice in evidence. Counsel for the defendant objected to the introduction of the notice in evidence for the reason that the same is incompetent and immaterial; that the same has no description and is not a proper location notice.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

42 The copy of the notice having been admitted in evidence, marked Plaintiff's Exhibit "C," the same was read to the jury as follows:

"Location Notice."

"Notice is hereby given that I, the undersigned, have, this sixth day of Oct., 1898, located a placer mining claim 1,500 ft. along creek bottom and 300 ft. from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, *Locator.*

Witnesses:

D. SUTHERLAND.

JAMES HANSON."

(Endorsed:) "Wm. A. Chisholm. Location, McKinley Cr. United States, district of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded

in Book —, on page 106, of the records of said district. Norman E. Malcolm, district recorder."

Q. That on the *the* 20th of October?
A. The 19th or 20th. I wouldn't be positive.
Q. State to the jury whether you have always claimed that location since it was made for you by Mr. Cahoon.

Counsel for the defendant objected to the above question for the reason that the same is incompetent and immaterial and calling for a conclusion of the witness.

43 Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

A. Yes, sir.
Q. What, if anything, have you done upon these locations, you and your partners?
A. In regard to work?
Q. Where did you go after the 20th of October, and when did you go on the claim again?
A. In April, this year.
Q. '99?
A. Yes, sir.
Q. State if you have been on the claim since.
A. Yes, sir; I have been on all summer.
Q. What in the nature of development-work have you done there?
A. We cut quite a long trail in order to get lumber and provisions up; we got about six thousand feet of lumber and built about two thousand feet of flume.
Q. You have been working on that claim this summer?
A. Yes, sir.
Q. You never abandon- that claim?
A. No, sir.
Q. You have been working there up to the present time?
A. Yes, sir.

Cross-examination by Judge WINN:

Q. You knew at the time you did this work that Hackley also was claiming this claim?
A. Yes, sir.
44 Q. You saw Hackley's notice?
A. I saw a notice; I didn't know the party at that time at all.
Q. You didn't make any inquiry to find out?
A. No, sir.
Q. And never have?
A. They were all strangers to me.
Q. And been a stranger up to the present time?
A. Up until last spring.
Q. Now, Chisholm, you have stated what Cahoon stated to you in the presence of Hall and some other parties when he returned to

Pleasant camp. Will you give all the conversation that took place there at that time?

A. That was all the conversation that we had.

Q. Was that the only conversation you had with Cahoon about this claim at Pleasant camp?

A. That was all.

Q. You never had any other or further conversation of any kind or description?

A. None at all.

Q. About going into partnership?

A. No, sir.

Q. Or with Hawes at that time?

A. Not at all.

Q. Now, Mr. Chisholm, do you swear positive that you and Hall furnished Cahoon with all the provisions that he had, including tea and rice, when he left Pleasant camp?

A. I do.

Q. You swear that Cahoon didn't take anything belonging
45 to he and Hawes or to himself before you and Hall supplied him?

A. Yes; we got everything they asked for.

Q. Didn't they have some things with them that he didn't ask for?

A. They might have, but we got all the provisions that was necessary for the journey.

Q. You don't know whether they had anything themselves?

A. They had nothing, because they were up there and I know what they had.

Q. Did you look in Cahoon's package and see what provisions he had?

A. No, sir.

Q. How can you swear that he didn't have some provisions that he didn't get from you and Hall, if you didn't see it?

A. I can swear he had no grub there.

Q. You say that you have always claimed this claim that you and Hackley are fighting over since the time that Cahoon got back there?

A. I claim it.

Q. Didn't you, sir, when you came down to Sunshine camp, in the presence of all these McKinley Creek boys, except Hackley, have a conversation, you all talking together, and you and Hall both claimed these two upper claims and virtually made *ni* claim whatever to these two known as the Hackley and McConaghy claims?

A. No such thing.

Q. Were you there when Cahoon and Lewis went back up the creek?

46 A. I was.

Q. What did they go up there for?

A. That is a question.

Q. Do you know?

A. I found out afterwards.

Q. You didn't find out while you were at Camp Pleasant?

A. No, sir.
Q. Did you know that they took Hanson's blankets?
A. I did not.
Q. Did you see Hall give them provisions or tell them that they could get provisions at Buckman's camp?
A. No, sir.
Q. You didn't hear anything about that the original claims that you claimed had been jumped?
A. That is what I found out.
Q. How did you find that out?
A. From Peter Hall.
Q. Do you pretend to tell this jury that after Cahoon had reported to you that he had staked out a claim for you, and after you got down to Sunshine camp you found that claim had been jumped and Cahoon hadn't made out the location notice, and while you knew that you never mentioned the fact to Cahoon that the claim had been jumped?
A. It wasn't necessary.
Q. You didn't do it?
A. No, sir.
Q. Who did you hear had jumped your claim?
A. I don't know; they were all strangers; some of the crowd.
47 Q. What crowd?
A. Of the McKinley Mining Company now.
Q. That would be either Woodin, Cahoon, Lewis, Hackley, or Leitch, wouldn't it?
A. Yes, sir.
Q. There were all there except Hackley?
A. That is what I understand.
Q. You saw them, didn't you?
A. I saw the rest; yes, sir.
Q. You heard that one of these parties had jumped your claim and you left that camp and started on down to Pyramid Harbor without even as much as making an inquiry as to who it was that had jumped your claim?
A. Yes, sir.
Q. Did Hall, in your presence, make any inquiry as to who had jumped his claim?
A. Not to my knowledge.
Q. Did you hear any conversation between Cahoon and Hall while you were up there?
A. No, sir.
Q. You didn't know at all what Cahoon and Lewis left the camp for, did you?
A. Not at that time.
Q. Isn't it a matter of fact that you and Hall had an understanding with Cahoon and the rest of these McKinley Creek boys while there at Pleasant camp that Cahoon and Lewis would return up the creek, and that you would all, the whole crowd would meet down to Pyramid Harbor?
A. Yes; we intended to go down to the harbor.

48 Q. What were you going to meet down there for?

A. We were going to Juneau for the object of recording our claims.

Q. You were all going down for the purpose of recording the claims?

A. Yes, sir.

Q. Couldn't you have sent the notice down?

A. We didn't know that.

Q. How long did you wait down there?

A. Five or six days; somewhere about there.

Q. You say that during all this time you staid down there waiting for Cahoon and Lewis to return you didn't know what Cahoon and Lewis had gone up McKinley creek for?

A. Not at all.

Q. Did you stay at Pyramid Harbor the whole time until Hall and you and Sutherland and Jack Dalton left Pyramid Harbor and went back up McKinley creek at the time you copied this notice?

A. No, sir.

Q. Where did you stay?

A. Chilcat.

Q. And Skaguay?

A. Yes, sir.

Q. Then you came back from Skaguay and you and Jack Dalton and Hanson and Sutherland and Hall, the parties who now make up the plaintiff company here, started back up McKinley creek?

A. Yes, sir.

Q. What for?

A. To see our claims and meet C. P. Cahoon.

49 Q. You started back for the purpose of looking for Cahoon and seeing the claims?

A. We started back for the purpose of meeting him was one object.

Q. What did you do when you saw him? What did you want to see him for?

A. To see what we would do—whether record down at Juneau or record up there.

Q. You didn't know whether you wanted to record up there or down here?

A. I had some work to do up there. I had to be up there, and I didn't know whether I could go to Juneau at that time.

Q. You continued on that trip—you and Jack Dalton and the boys?

A. Yes, sir.

Q. You went back up there and found Hackley's name on the stake, staking this claim that you are now claiming?

A. Yes, sir.

Q. Did you see McConaghy's notice?

A. I didn't get up to it.

Q. Where was the notice that you saw posted of your claim?

A. At the edge of the creek.

Q. What on?

A. An old *stag*; the top of a tree.
Q. An old snag like?
A. Yes, sir; an old snag.
Q. What kind of a paper was it written on?
A. No paper.
Q. How was the notice?
A. As I stated.
50 Q. What kind?
—. An indelable pencil.
Q. What color?
A. Kind of blue like. Part of it was chopped off.
Q. It was so, Mr. Chisholm, that you couldn't read it at all?
A. Yes, sir.
Q. Then this notice here couldn't be a copy of that notice you saw on that snag?
A. We copied that off the stake as near as we could.
Q. And some of it you stated you couldn't make out. Then this paper couldn't be an exact copy of it?
A. As near as we could get it.
Q. You saw the name signed on that notice purporting to cover what you claim is your claim.
A. All I saw is Chisholm; the other part was blotted out.
Q. Then this location notice here which you have dated the 6th of October was really made out on the 19th or 20th?
A. That was copied from the stake.
Q. This notice which you have here offered in evidence was made out on the 19th or 20th and you dated it on the 6th of October?

By the COURT: That is not a fair way that you state it to the witness.

Q. Then what I understand you to say that at the time you wrote this out was really on the 19th or 20th of October?
A. Yes, sir.
Q. And was dated on the 6th of October?
A. Yes, sir.
Q. At the time you claim that Cahoon put up this notice?
A. Correct.
51 Q. Who wrote this?
A. My name is signed to it.
Q. Who wrote it?
A. Mr. Mix, our recorder.
Q. That is your handwriting here?
A. Yes, sir.
Q. Was Mr. Mix up there on the claim?
A. No.
Q. Where did he write this?
A. When we returned we called a miners' meeting and appointed Mr. Mix recorder.
Q. Did you write out a copy just exactly like this copy and Mix copied it?
A. Mix copied what I copied off the stake.

Q. Was your copy like this copy?

A. As near as I can remember, he didn't change it.

Q. Then you wrote this yourself and he copied it?

A. I copied that from the stake.

Q. Did you compare this with the one you got Mix to write out; did you compare the two together?

A. He compared them together and gave me the copy.

Q. You didn't take the memorandum you give him and compare it yourself?

A. I don't remember as I did.

Q. When did you see any of the McKinley Creek Mining Company again after you went up and got a copy of your notice up there on the claim?

A. I don't hardly remember. I saw Mr. Hawes; he went up with us, but didn't go to the creek.

52 Q. Hawes started back with you from Pyramid Harbor up the creek. You said you started back to meet Cahoon. When did you and Dalton, Hanson and the other members of this plaintiff company—what period on that trip did you make up your mind to go back to jump Hackley's and McConaghy's claims?

A. I didn't make up my mind to no such thing.

Q. When did you make up your mind to go back and take a copy of the notice; what part of the trip did you parties make your minds to do that?

A. When we got up there.

Q. Did you expect when you arrived at Pyramid Harbor to have to go back up McKinley creek; didn't you say you sent a number one way and a number another to meet Cahoon?

A. I did.

Q. Then, you didn't expect to have to go back up there?

A. We didn't know as we had to.

Q. Then, when you got up there, and not until you got on the ground on this claim that you determined to take a copy of this notice or do anything in regard to the claim, was it?

A. Right there we agreed to do it.

Q. How came you then to agree to do it?

A. Because it was our duty. We wanted a copy, as we didn't meet Cahoon; we made a copy from the stake, as it looked at that time as though some crooked work was going on.

Q. You thought some crooked work was going on at that time?

A. We did.

Q. You made out this notice and had it recorded and went on back to Pleasant camp.

53 A. Yes, sir.

Q. Did you and Dalton and all the parties constituting this plaintiff company go back to Pleasant camp?

A. No, sir; Hanson and I remained on the creek. Pet Hall and Mr. Dalton went to Pleasant camp.

Q. When Cahoon was present I believe you said the only conversation you had about this particular claim in controversy is the conversation you repeated to Mr. Malony?

A. Yes, sir.
Q. That is the only conversation you had?
A. That is all.
Q. Did you have a conversation about that time about all these claims, and you suggested at that time about you and Dalton and the rest going in together and forming a company to hold all these claims?
A. We talked of it a short time before that.
Q. Before Cahoon went to Pleasent camp?
A. On his return; we merely talked of this matter.
Q. Before you started to Boulder creek?
A. Exactly.
Q. Then did you have some other talk at Camp Pleasent?
A. Certainly.
Q. Was there any other conversation that you had?
A. Not that I remember of.
Q. You have told it all now, have you?
A. I think so; I don't remember of anything else.

54 JAMES HANSON, called on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. How long have you resided in Alaska?
A. About two years.
Q. Where were you about October 4th, '98?
A. Pleasent Camp.
Q. Up near the boundary line?
A. Yes, sir.
Q. Who was there with you at that time?
A. Mr. Chisholm, Mr. Hawes, Mr. Cahoon, Mr. Hall, and Mr. Sutherland.
Q. What were you doing there at that time?
A. Putting up a house.
Q. Who were you working for?
A. Mr. Chisholm was the foreman there.
Q. State what, if anything, occurred there about that time with reference to locating claims or prospecting?
A. Well, we talked about going out on a prospecting trip.
Q. Who was talking about it?
A. Us fellows that was working there.
Q. Did you go?
A. Yes, sir.
Q. Who went?
A. Mr. *and* Sutherland and Cahoon.
Q. Did you have any arrangements or do you know of any arrangement between Chisholm, Hall, and Cahoon at that time about prospecting or locating?

55 Counsel for the defendant objected to the above question for the reason that the same is not proper.

By the COURT: If he heard any talk between Cahoon and Chisholm, he can state it.

A. Yes; I heard about staking.

(By the COURT:)

Q. About Cahoon staking for Chisholm?
A. *Yes, sir.*
Q. State what it was.
A. Cahoon wrote out a power of attorney and took it along up the creek.
Q. Look at that paper and see if that is your signature to it as a witness.
A. Yes, sir.
Q. That was given up at Pleasant camp?
A. Yes, sir.
Q. You was present, then, when this was given?
A. Yes, sir.
Q. State to the jury what you know about them outfitting Mr. Cahoon.

Counsel for the defendant objected to the above question for the reason that the same is leading, suggestive, and calling for a conclusion of the witness. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. State if you know anything about it.
A. Mr. Chisholm and Mr. Hall outfitted us with what grub we took along.
56–66 Q. Outfitted whom?
A. My and Mr. Sutherland and Mr. Cahoon.
Q. Now, for what purpose did they outfit you?
A. To stake out claims for them.
Q. Did you go down to Porcupine creek?
A. Yes, sir.
Q. When you got down there what did you do?
A. Mr. Cahoon staked a claim for Chisholm first and Hall next.
Q. Were you present?
A. Yes, sir.
Q. And a witness to it?
A. Yes. sir.
Q. Who else was present, if anybody?
A. Mr. Hackley and Mr. Sutherland were right close there.
Q. What date was that?
A. The 6th day of October.
Q. You say Mr. Hackley was present at that time?
A. Yes, sir; right there, close.
Q. Did he make any objection to Cahoon staking that claim?
A. No, sir.
Q. Did anybody else make any objections?
A. Not that I heard of.
Q. How long did you remain there?

A. We were there two days.
Q. Were you with Cahoon all this time?
A. Yes, sir.
Q. After you staked the claims what did you do next?
A. We went back to Pleasent camp.
67 Q. When did you get back to Pleasant camp?
A. The eighth we got back.
Q. Who did you find there when you got back?
A. Mr. Chisholm, Mr. Hall, and Mr. Hawes.
Q. Did you hear any conversation between Cahoon, Chisholm, and Hall?
A. No, sir; I wasn't right there.
Q. How long did you remain at Pleasant camp after that?
A. I staid there that day, and the next morning I left for Pyramid Harbor.
Q. You said you were present when Mr. Cahoon, on the 6th, located these claims?
A. Yes, sir.
Q. Mr. Hackley was present at that time?
A. Yes, sir.
Q. He made no objections?
A. No, sir.
Q. You went down to Sunshine, did you?
A. Yes, sir.
Q. Who did you find there?
A. Mr. Hall, Mr. Chisholm, and Mr. Haws.
Q. What, if anything, occurred there?
A. Nothing particular; Mr. Hall, Mr. Cahoon, and Mr. Lewis went back up to Porcupine.
Q. What is this about them taking your blankets—did you give Cahoon the blankets?
A. Yes; I gave him my blankets; his blankets were on the horses and had gone down ahead of us.
Q. You were going down to Pyramid Harbor?
A. Yes, sir.
68 Q. That is how you come to give Cahoon your blankets?
A. Yes, sir.
Q. Did you go down to Pyramjd Harbor then?
A. Yes, sir.
Q. How long did you stay there?
A. Four or five days.
Q. And returned again?
A. Yes, sir.
Q. Who returned with you?
A. Mr. Dalton, Chisholm, Hall, and Hawes.
Q. When was it you got up to Porcupine?
A. About the 19th or 20th of October.
Q. Did you go up to where this notice of location was?
A. Yes, sir.
Q. Was Mr. Cahoon or any of these people there then?
A. No, sir.

Cross-examination by Judge WINN:

Q. You are one of the members that form this Alaska United Mining Company, are you?

A. Yes, sir.

Q. You are interested in this controversy, are you?

A. Yes, sir.

Q. Hanson, what was said up there at Pleasant camp? Tell the conversation now, as near as you can, at the time this power of attorney, which you call a power of attorney, was witnessed by you and when it was written out.

A. The conversation between who?

Q. The parties to the instrument—Cahoon, Hall, and Chis-
69 holm. What talk was had?

A. We was all talking about going out on a prospecting trip and Chisholm and Hall gave Mr. Cahoon a power of attorney.

Q. Who mentioned the fact first, Hanson?

A. What fact?

Q. About the power of attorney.

A. I couldn't say.

Q. Do you remember any particular conversation that took place just prior to making out this paper, called a power of attorney here?

A. Not just exactly the words that was said.

Q. Did Hall first mention the fact about a power of attorney or did Cahoon mention it first?

A. I couldn't say that.

Q. Now, what amount of provisions did you people take with you, Hanson?

A. We took about forty pounds apiece, I think.

Q. What kind of provisions did you have in your own pack?

A. Flour, rice, and sugar.

Q. What kind did Sutherland?

A. I don't know.

Q. What kind did Cahoon have?

A. I believe he had dishes and his blankets is all he took.

Q. Are you positive whether or not Cahoon didn't have some provisions with him?

A. That is all I seen.

Q. You are positive he didn't have any?

A. Yes, sir.

Q. Did you look into his pack?

A. Well, I didn't look into his pack.

70 Q. How can you know he didn't have any in there?

A. When he came to unpack the package I seen.

Q. You didn't look into it then?

A. Yes, sir.

Q. You are positive he had no teas or rice or anything of that discription in his package?

A. Yes, sir.

Q. When did you first see that package opened, and where?

A. On the Porcupine.

Q. Did you hear any further conversation that took place between Cahoon and Hall and Chisholm, or either one of them, yourself being present, before they left Camp Pleasant, in regard to anything to be done with the claims they had staked out or anything of that kind?

A. No, sir.

Q. They didn't talk about taking all the claims and making a partnership of it?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial.

By the COURT: I will sustain the objection. I don't think it is material.

Counsel for the defendant duly excepted to the ruling of the court.

Q. Then the whole of the conversation you heard up there is exactly what you have repeated here to the court?

A. Yes, sir.

Q. Did you hear anything else about these mining claims only what you have related?

A. No, sir.

71 Q. You went on down there—did you meet any other parties on the way down before you got up to McKinley creek, where this property in controversy is?

A. Yes, sir.

Q. Who did you meet?

A. Mr. Hackley.

Q. Who else?

A. All the rest of that crowd.

Q. How many went up McKinley creek?

A. My. Hackley, me, Cahoon, and Sutherland.

Q. Where was Hackley at the time you saw Cahoon writing on this snag?

A. Right close there—within a 100 feet.

Q. What were they doing?

A. Prospecting.

Q. Working and panning out, digging, and looking for gold?

A. Yes, sir.

Q. What did Cahoon write that on there with?

A. With a blue pencil.

Q. Do you remember the language of that notice?

A. Well, I couldn't just repeat it exactly.

Q. Did you read the one over you claim he put on there for Chisholm?

A. Yes; I read them over.

Q. And Hackley and Sutherland were less than 100 feet from him?

A. Yes, sir.

Q. Did Hackley find any gold there?

A. Yes, sir.

Q. He found some gold and called for you people to come

72 and see it?

A. Yes, sir; for Mr. Sutherland. He was the first one.
Q. Were you with them all the time?
A. No. Mr. Sutherland and Mr. Cahoon came down into the creek about ten minutes before Mr. Hackley.
Q. Which one discovered gold?
A. Mr. Sutherland.
Q. What did he say when he found it?
A. I don't know what he said.
Q. Did he say anything to you and Cahoon?
A. Yes, sir.
Q. What did he say?
A. He said he found colors.
Q. When did Hackley tell you he found colors?
A. He was down in the creek, and he ran onto a crevis-.
Q. According to your idea, Sutherland first found colors, and Hackley found it next, and within 100 feet of where this sign was put up?
A. Yes, sir; less than 100 feet.
Q. It would be on one of the claims in controversy?
A. Yes, sir.
Q. Which one?
A. Mr. Hall's.
Q. That on the claim which McConaghy is claiming now?
A. Yes, sir.
Q. So Mr. Hackley found gold on the claim in controversy?
A. Yes; that was where Mr. Sutherland first found the colors.
Q. Sutherland found colors below the claim in dispute between Hall and McConaghy, and also found some on the other claim in controversy?
73 A. Yes, sir.
Q. Isn't it a fact that Hackley found some pretty nice little nuggets and hollowed for you people to come and see them?
A. Yes, sir.
Q. Whose claim was that on?
A. Mr. Hall's.
Q. That is the one claimed in this case to be McConaghy's?
A. Yes, sir.
Q. You say that Sutherland found colors on the other claim. Did you see Hackley find anything on that claim while you were up there?
A. No, sir.
Q. You were with him all the time?
A. Yes, sir.
Q. Right along by his side?
A. Yes, sir.
Q. You started out side by side?
A. Most of the time we were close together.
Q. How many days were you up there?
A. Two days.
Q. Right along together, side by side, all the time?

By the COURT: You have followed that long enough; it is not a material point.

Counsel for the defendant duly excepted to the ruling of the court.

Q. Now, before you left up there all you parties did a good deal of staking.

A. What do you refer to?

74 Q. Didn't you stake out a claim?

A. Yes, sir.

Q. Sutherland, did he stake out one?

A. Yes, sir.

Q. And one staked out for Hawes?

A. Yes, sir.

Q. Did Hackley stake out one?

A. No, sir.

Q. Was that all the staking that was done?

A. Mr. Cahoon staked out one for himself.

Q. You don't mean the whole time of this staking you parties were together up there, do you, Hanson?

A. Yes, sir; just about all.

Q. You would all go and stake one claim, and then all go and stake another claim?

A. Yes, sir; all within 150 feet.

Q. You came on down to Sunshine camp, didn't you?

A. Yes, sir.

Q. Before you came down to Sunshine camp, didn't you and Cahoon and all of you that was in this party, including Hackley, take your claims in a bunch and for a partnership?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. You went down to Sunshine camp, did you?

A. Yes, sir.

75 Q. That is the place you loaned Mr. Cahoon your blankets?

A. Yes, sir.

Q. What did you let him have your blankets for?

A. He didn't have any others.

Q. What was Cahoon and Lewis going back up the creek for?

A. I expect Mr. Cahoon was going up there to do some staking I know he staked five claims there.

Q. Did you know at that time what he was going back for?

A. No, sir; but I found out afterwards.

Q. You know nothing about the fact that Hall testified that he was going back to rectify any staking or that any claim had been jumped?

A. No, sir.

Q. Did you know at that time that there had been any claim jumped?

A. No, sir.

Q. Did you hear any talk among the McKinley Creek boys or any of them during the time you was there about any claim being jumped on McKinley creek?

A. No, sir.

Q. Where did Cahoon and Lewis get their food to go back up there? Who got it for them, if you know?

A. I believe they got it at Buckman's camp.

Q. How did they come to get it there?

A. I don't know; just simply took it out.

Q. And went back?

A. Yes, sir.

Q. You heard no other conversation about these claims or any conversation except what you have related?

76 A. No, sir.

Q. Now, at the time that you left to go down to Pyramid Harbor, had Lewis and Cahoon gone away from the camp?

A. They left at the same time we did.

Q. You went on down to Pyramid Harbor for what purpose?

A. To record the claims.

Q. Who were you to meet there, if any one?

A. Nobody.

Q. You knew that Cahoon hadn't made out the notices, didn't you, for Hall and Chisholm? Wasn't you to meet Cahoon and Lewis?

A. Yes; we was to wait for them there.

Q. You waited there about how long?

A. Four or five days.

Q. Then where did you start to?

A. Porcupine.

Q. What did you start back up there for?

A. I started back to put up permanent stakes.

Q. You started back up there to stake it?

A. Yes, sir.

Q. Was that the only purpose that you started back up there? Did Dalton, Chisholm, and Hall and the rest of the party that make up your company start up there for the purpose of putting up your stakes?

A. No, sir; they went up to see the claims.

Q. How far is it from Sunshine camp up to about where these claims are?

A. Eight or nine miles.

Q. What were these other boys going back up there for,

77 besides yourself?

A. I don't know exactly what they were going for; I guess to look over their claims.

Q. Did they have any conversation in your presence what they were going for?

A. No, sir.

Q. They all went back up there?

A. Yes, sir.

Q. How far did Hawes go?

A. As far as Porcupine, and then on to Pleasent camp.
Q. What was done when you go- up there, Hanson?
A. Well, nothing done exactly; I went down to show them the stake where Mr. Cahoon had staked Mr. Hall and Mr. Chisholm.
Q. Did you do any further staking up there at that time?
A. No, sir.
Q. What did Hall and Chisholm do after they found where the stake was; do you know?
A. Well, the- copied off the notices as near as they could off that stake.
Q. Did they do anything else while they were up there on this trip?
A. They went up the creek a ways.
Q. Did they do anything else on the claim; put on any other notices, or anything of that kind?
A. No, sir.
Q. You went on up the creek; how long did you stay up there?
A. We went up and back the same day.
Q. Were Hall and Chisholm with you all the time?
A. Yes, sir.
78 Q. Are you testifying to all that Hall and Chisholm did on this trip?
A. All that I know of.
Q. You were with them?
A. Yes, sir.
Q. You would know it if they had done anything else?
A. Yes, sir.
Q. Did you all leave there and go back to Pleasent camp?
A. We didn't all go back to Pleasent camp; me and Mr. Chisholm staid there a couple of days.
Q. Mr. Dalton and the rest went back, did they?
A. Yes, sir.
Q. Did you meet any persons coming up the creek at this time at all?
A. Yes; we saw Mr. Gorsby and Mr. Neil.
Q. Who is Mr. Gorsby; what does he do?
A. Prospecting up there.
Q. He been working down there?
A. No, sir.
Q. Did he get one of these claims that Cahoon claims that he staked out for Chisholm and Hall?
A. Not that I know of.
Q. Did you meet anybody else except Gorsby?
A. Mr. Neil.

Redirect examination:

Q. Where did you meet Hackley when you went up on Porcupine creek?
A. Below McKinley creek.
79 Q. Who was with him?
A. All the rest of that crowd.

Q. Did he turn back with you?
A. Yes, sir.
Q. Did you come together in the immediate neighborhood where Cahoon made that location?
A. Yes, sir.

80 DANIEL SUTHERLAND, called on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. How long have you lived in Alaska?
A. About two years.
Q. What is your business or occupation?
A. Mining and prospecting.
Q. Where were you along about the 6th day of October, '98?
A. Pleasant camp.
Q. Who was with you at that time?
A. Hall, Chisholm, Cahoon, Hawes, and Hanson.
Q. Look at that notice and see if that is your signature there.
A. Yes, sir; that is my signature.
Q. You were a witness to this instrument purporting to be a power of attorney at that time?
A. Yes, sir.
Q. Well, state what, if any, arrangement you boys had with Chisholm and Hall about prospecting.

Counsel for the defendant objected to the above question for the reason that the same is leading, suggestive, and calling for a conclusion of the witness. Question was withdrawn.

Q. State any conversation that took place with reference to any prospecting.

81 A. We agreed amongst ourselves to start out prospecting, and Cahoon drew up a power of attorney to stakes claims for Chisholm, Hall, and Hawes.

Q. Go ahead.
A. We were outfitted by Chisholm and Hall to go out.
Q. When was this, about what date?
A. About the 4th of October, '98.
Q. At Pleasant camp?
A. Yes, sir.
Q. Where did you go from there?
A. To Porcupine.
Q. Who was along in the party?
A. Cahoon, Hanson, and I.
Q. When did you get to Porcupine?
A. That evening.
Q. After you got to Porcupine what did you do?
A. We camped there that night, and on the morning of the 5th started up the creek.
Q. After you got up the creek what did you do?

A. Before we got to the mouth of McKinley creek we met Hackley and Lewis and several other parties.
Q. What then?
A. Hackley and the others turned back and went up McKinley creek.
Q. What did you do when you got up McKinley creek?
A. I was the first to get into the creek. I did a little panning and found there was gold there before the rest of the boys got there.
Q. Explain what kind of a place this was to get into there.
A. It is a kind of a box canyon.
Q. A difficult place to get in?
A. Yes, sir.
82 Q. Well, you say you discovered the first gild there yourself?
A. Yes, sir.
Q. About where was that? About what claim at the present time?
A. On the claim called the Chisholm claim.
Q. What, if anything, in the way of locations did you see Cahoon make there?
A. He didn't locate that day.
Q. What day did he?
A. On the 6th.
Q. State to the jury what locations were made on the 6th.

Counsel for the defendant objected to the above question for the reason that the same is calling for a conclusion of the witness. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

A. We stopped at a certain point where there was a snag stuck up amongst the rocks, and Cahoon said he believe- he would locate the boys here as we go up, and I said all right, and he located Chisholm on the lower side and Hall on the upper side.
Q. Who was present at that time?
A. Hackley, Hanson, and I.
Q. Was any objection made by anybody to the locating of those claims?

83 Counsel for the defendant objected to the above question for the reason that the same is leading and suggestive. Objection sustained by the court.

Q. How long did you remain on the creek?
A. That day until about noon on the next day.
Q. Who was staked next above?
A. Hawes.
Q. Is Hawes now one of the McKinley Creek party?
A. Yes, sir.
Q. Was he along?
A. No, sir.
Q. Who staked for him?
A. Cahoon.

Q. You say that was on the 6th day of October?
A. Yes, sir.
Q. Where did you go from there?
A. We went up the creek and Cahoon and I and Hanson staked above.
Q. After you got through staking, where did you go to?
A. We went up another creek.
Q. Where did you go after that?
A. We started on down the creek the morning of the 7th.
Q. Where did you go to?
A. We were prospecting along going down, Hackley and I together, and he left me so he could go down to stake the claim below Chisholm and Hanson, and I followed down, and about half way we met and went into camp.
Q. He said he was going to stake the claim below Chisholm's?
A. Yes, sir.
84 Q. Where did you go to from that camp?
A. We came back to Pleasant camp.
Q. Who did you see at Pleasant camp when you got there?
A. Chisholm and Hall.
Q. Did you hear any conversation or did any conversation occur at that time between Cahoon, Chisholm, and Hall?
A. Yes, sir.
Q. State what it was.
A. He told them that he had staked for them.
Q. Where did you leave Hackley?
A. He s-aid up with the boys, Lewis, West, and McConaghy.
Q. When did you next go upon the ground?
A. About the 19th or 20th.
Q. Were you along there with Chisholm and Hall on that date?
A. Yes, sir.
Q. When did you next go upon the ground after that fall?
A. In May of this year.
Q. State what, if any, work you have been doing there.
A. We have been working on the claims pretty much all summer, cutting trails and building a camp and building a flume to carry water two thousand feet, and working on the claims.

Cross-examination by Judge WINN:

Q. You did all this work and you knew at the same time that these claims were being claimed by Hackley and McConaghy, didn't you?
A. I knew there was a dispute on them.
85 Q. Now, when you left the camp at first and started out with Cahoon, yourself, and Hanson, you were present when this power of attorney was made out?
A. Yes, sir.
Q. How came that to be made out?
A. Cahoon drew it.
Q. For Hall?
A. Yes, sir.

Q. He told him he was going out and he would locate a claim for him, did he?
A. Yes, sir.
Q. How long was it after that that you started out?
A. Maybe an hour and a half or two hours.
Q. You fixed up your grub and went ahead?
A. Yes, sir.
Q. You took enough to last a week, each one, and took your blankets?
A. Yes, sir.
Q. You met Hackley down at the mouth of McKinley creek?
A. Yes, sir.
Q. Then your original party and Hackley's got together and went up McKinley creek?
A. Yes, sir.
Q. Did you see Hackley discover any gold?
A. Yes, sir; we all found gold there.
Q. You say you was the first to find gold. Who was the next to find gold?
A. I don't know whether it was Hackley or some of the others.
Q. You and Hanson staked out a claim while you were up
86 there, did you?
A. Yes, sir.
Q. You know where Hawes' claim was staked out by Cahoon?
A. Yes, sir.
Q. That was adjoining one of the claims in controversy?
A. Yes, sir.
Q. Do you know whether or not Hawes owns that?
A. It goes by the name of the Wooden claim.
Q. You and Hanson also staked out claims?
A. Yes, sir.
Q. Then, after you staid a day or so, you came on down to Sunshine camp?
A. Yes, sir.
Q. And returned to Pleasant camp, did you?
A. Yes, sir.
Q. Then, on this second trip, when you got back to Pleasant camp after this staking was done, did you hear any conversation that took place between Cahoon and Chisholm and Hall?
A. On the second trip?
Q. After you got back on the first trip. Did you go back to Pleasant camp?
A. Yes, sir.
Q. When Cahoon got back did you hear any conversation take place between him and Chisholm and Hall?
A. Yes, sir.
Q. Then, on this second trip that you took, going down to Boulder creek, were you with that party?
A. Yes, sir.
87 Q. Chisholm and Hall came along with you on that trip?
A. Yes, sir.

Q. You finally came down to Sunshine camp, did you?
A. Yes, sir.
Q. Did you hear any talk about any claim being jumped?
A. Yes, sir; Cahoon told Hall that the boys had overstaked them up there.
Q. In your presence?
A. I don't remember whether or not it was Hall that told me; I don't remember.
Q. Did Hall tell you at that time who had overstaked him?
A. He did not.
Q. Did he indicate as to who the party was at all?
A. No, sir; only the boys.
Q. Who did you understand?
A. Some of that crowd up there.
Q. That crowd up there was in the camp while you was there except Hackley?
A. I know the others was all there. I didn't know Hackley wasn't there.
Q. No investigation was made to find out who the party was that had overstaked him?
A. No, sir.
Q. Hall seemed to be perfectly satisfied with it, did he?
A. No, sir; he wasn't.
Q. He didn't go back up the creek to see about it, then, did he?
A. No, sir; not at that time.
Q. You all went down to Pyramid Harbor?
88 A. Yes, sir.
Q. And waited there awhile, did you?
A. Yes, sir.
Q. Staid there a week or so?
A. About a week.
Q. What were you waiting for there?
A. For Cahoon and Lewis.
Q. Then what did you do?
A. Started up the river.
Q. What did you start up the river for?
A. We thought it likely we would meet them or find out what had become of them.
Q. Hanson said you went back to look at the claims?
A. Yes, sir; we allowed to go up there.
Q. You intended to go back up there?
A. Yes, sir.
Q. Did you start back up there to meet Cahoon or start back to go up McKinley creek?
A. Both, I guess.
Q. You expected to meet Cahoon and get the notices and fix up for your recording?
A. Yes, sir.
Q. What was the use of going up there, Sutherland?
A. The boys wanted to go up to look at their claims.

Q. When you got up there didn't you hear that Cahoon and Lewis had gone on down?

A. No, sir.

Q. Didn't hear about that?

A. No, sir.

89 Q. The day before you reached McKinley creek didn't you hear that?

A. No, sir.

Q. Then if you had met Cahoon you wouldn't — viewed the claims at all?

A. We would have gone up, as the boys wanted to see the claims.

Q. You started up for that purpose?

A. That is the way I understand it.

Q. Had you given up this matter of having the claims recorded, in the first place—you had given up the idea of getting these notices and sending them down to Juneau and had concluded to go back up to see the claims?

A. Well, we didn't give up the notion to record.

Q. One of your pirposes of starting back up there was to form a recording office and elect a recorder?

A. We did not.

Q. Didn't you elect a recorder?

A. Yes, sir.

Q. You didn't start up for the purpose of electing a recorder; that was a secondary thought after you got up there?

A. Yes; I think that is the way it was.

Q. When you got up there you elected him and then you went along with Hanson, Chisholm, and Hall to look at these two claims in controversy?

A. Yes, sir.

Q. Did you see the notices of Hackley and McConaghy up

90 there?

A. Yes, sir; I believe I saw McConaghy's notice. I didn't see Hackley's.

Q. Did you see Chisholm's notice up there at that time?

A. Yes; I seen what was left of it.

Q. It had been chopped off partly, had it?

A. Part of his had been rubbed or chopped off, but Hall's was pretty plain. I could read most of it.

Q. Then you saw that notice on this trip?

A. Yes, sir.

Q. After you got back from this trip up there, when Hall and Hanson went up there, did you meet Cahoon after that down about Haines' and informed Mr. Cahoon about Chisholm and Hall going up there?

A. Yes, sir; I told him that we had recorded the claims.

Q. Did you have any further conversation with him at that time?

Q. We was together there for quite a while.

Q. Did you state to Cahoon, in the presence of Hackley, that you was disgusted with the way these boys had done?

A. I did not, sir. I might have said I was disgusted with the

way things was going on the creek. I never alluded to Chisholm and Hall.

Q. Didn't you tell Cahoon there at that time, in that conversation, that Chisholm had told you that if you would stick by and help them out up there that he could beat Hackley and McConaghy out of their claims?

A. No, sir; not as I remember.

91 Counsel for the plaintiff, having no further evidence to offer, rested the case on behalf of the plaintiff.

Counsel for the defendant moved the court for a nonsuit and for an instruction to the jury to return a verdict for the defendant for the reason that neither one of the parties, Chisholm or Hall, who are claiming the respective claims in controversy have complied with the laws of the United States in staking out and recording the two claims, and that the same was not done within the time required by law and after the claims were staked out, as shown by the testimony, by McConaghy and Hackley, and that there is nothing in the evidence as it stands now to show that any discovery has ever been made by either one of the claimants, Hall or Chisholm, upon either one of the claims in controversy, and that the evidence in the case is not sufficient to sustain a verdict for the plaintiff company,
92 who holds as successor in interest, they being parties belonging to the partnership of the plaintiff company.

Motion denied by the court; to which ruling counsel for the defendant then and there duly excepted.

Counsel for the defendant renewed the above motion on the further grounds that it has not been shown by the evidence that the said Chisholm and Hall were citizens of the United States at the time of the location of said claims in controversy.

Motion denied by the court; to which ruling counsel for the defendant then and there duly excepted.

93 C. P. CAHOON, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. You are one of the defendants in this case, are you, and a member of the company copartnership?

A. Yes, sir.

Q. Just prior, Mr. Cahoon, to leaving Pleasent camp and taking this trip up McKinley creek testified to where were you?

A. At Pleasent camp.

Q. Just prior to that?

A. At Dalton's post, on the inside.

Q. Who was there with you?

A. Mr. Hawes.

Q. Where did you and Mr. Hawes first meet?

A. We have been acquainted the last 11 years.

Q. You and he were together in British Columbia, still further above Pleasent camp?

A. Yes, sir.

Q. What were you coming down this way for?

A. We had been prospecting in the Northwest territory and we heard of the strike at Porcupine, and we came out with the intention of prospecting.

Q. When did you meet Chisholm and Hall, two members of the plaintiff company in this case?

A. I met Chisholm and Hall about the 15th of September at Pleasent camp.

Q. You met them after you and Haws had left this point
94 in British Columbia, did you?

A. Yes, sir.

Q. How long did you and Hawes stop at Pleasent camp?

A. Between two and three weeks.

Q. What were you doing there?

A. We were working for Mr. Dalton on a house; whipsawing lumber most of the time.

Q. Who of the plaintiff company did you become acquainted with in that camp?

A. I was already acquainted with Mr. Hall. I got acquainted with Mr. Chisholm and Mr. Sutherland.

Q. Where did you first get acquainted with Mr. Hall?

A. Coming up from Seattle in March?

Q. On your first trip to this country?

A. Yes, sir.

Q. When did you become acquainted with the rest of the parties?

A. I met Mr. Hanson going in on the Dalton trail; I met Mr Chisholm and Mr. Sutherland at Pleasent camp for the first time.

Q. Now, state as briefly as you can what took place and what conversation you had with Chisholm and Hall, Hanson, and Sutherland there, or all of them, just prior to your leaving Pleasent camp and going up McKinley creek in regard to these mining prospects.

A. At the time we started to work we didn't expect to be there over a week, but we kept on working until nearly three weeks, and as soon as we got through I proposed to go down and prospect on the Porcupine.

Q. When was this proposition made? State to the jury
95 who made the proposition and who was present.

A. We had the conversation with Mr. Hawes, Mr. Chisholm, Mr. Hall, Mr. Sutherland, and Mr. Hanson.

Q. Go ahead and state your conversation with them about this matter.

A. As soon as we got through, I think on the 4th of—on the morning of the 4th——

Q. Give the month.

A. Of October. I made the remark I would go down there, and Mr. Hanson and Mr. Sutherland had also got through and they were going with me, and Mr. Sutherland testified I offered to take a power of attorney from Mr. Hall and Mr. Chisholm with me—in case I

should find anything I would stake a claim for them—and I says all right I would take one for my partner, Mr. Hawes, and simply through courtesy I offered to take one for them.

Q. How come you to stop at Pleasant camp?

A. We stopped for a week or so on our way down to McKinley creek, and I heard Mr. Hall say that he wanted to get somebody to whipsaw lumber for the roof of the house, and Mr. Hawes and I talked it over, and we had plenty of time to prospect, and so we concluded to stop there.

Q. Now, you have heard the testimony of some of these witnesses on the adverse side regarding a grub stake; tell the jury about that.

A. We had some provisions left and I expected to buy what I needed of Mr. Dalton, but Mr. Hall kindly consented to furnish me all I wanted. He said, I have a cache, and it is going to spoil, and he got the stuff out.

96 Q. Was that before or after you had taken his power of attorney?

A. About the time, I think. I had drawn up the power of attorney, I think.

Q. Did you have any provisions that belonged to you or you and Hawes other than the provisions that you got there?

A. Yes, sir,

Q. What did they consist of?

A. I had bacon, about four pounds. I had a package of tea, nearly a *b*ound, and I had some rice, and also some hard bread.

Q. Did you take this along with the other provisions that Hall and these parties had furnished you?

A. Yes, sir.

Q. What time did you leave there?

A. It was some time in the forenoon.

Q. Did any other conversation take place about the location of any claims between you and Hall and Chisholm and Hanson or any of these other interested parties on the other side of the case?

A. No, sir.

Q. Now, I will ask you, Mr. Cahoon, to look at the drawing on this side of this plat about the relative locations marked Pleasant camp, Porcupine creek, Cahoon creek, McKinley creek, Boulder creek, and Sunshine camp, and state if this is a fair representation of the relative location of the points I have just mentioned.

A. Yes, sir; it is.

Q. Do you know who drew that?

97 A. Lewis drew it.

Q. The points marked here; those are the points I have mentioned, camps, and so forth; they are written on the map?

A. Yes, sir.

Q. And indicated by a little cross or stars?

A. Yes, sir.

Q. That is a fairly good representation without a survey or measurement?

A. Yes, sir; very good, indeed.

Q. Then you left Pleasant camp on what day?

A. On the 4th of October.

Q. Tell where you proceeded to, and make it as short as possible.

A. We came down on Porcupine creek that evening, and the next morning we proceeded up the creek. We met with Hackley and the rest, McConaghy, Mr. Wooden, Leitch, Mr. Henry, by the creek, just below the junction of McKinley creek, and they said they had been prospecting up Porcupine with no results, and they said there was no use to go up there. Well, I said, have you been up the other creek? and they said, *Ni*, we haven't, and Mr. Hackley said we could get up there by going around that way; and I started up the creek, and Hackley said, Where are you going? and we went up a little gulch that leads up on a little bench below McKinley creek, on the left-hand side, and it took us some time before we could get there and get down into the creek. I think it was nearly 4 o'clock before we could get there, and Mr. Sutherland and I went
98 down a slide, the other three boys went up the creek further, and as we came up Mr. Hackley had just got down in the creek and was prospecting, picking, and digging around, and Mr. Sutherland and I started up the creek. Hackley was there, and Mr. Henry and Hanson had got into the creek at that time and we went up a little ways and came to the falls and came back, and on our way back Mr. Hackley hollooed to us that he had discovered gold and to come over and see it, and I went down there and he showed me a nice piece of gold.

Q. Right here now I will ask you to look at the other side of this plat I have referred to, and ask you if the drawing there represents McKinley creek, Cahoon creek, and Porcupine creek with the claims marked out; if that is a fair representation of the way they are laid out, including the claims in controversy, and also the number of claims that were staked by your parties.

A. Yes, sir; that is a very fair representation.

Q. What are the two claims marked closest to the mouth of the creek? What two claims are those?

A. Hackley and McConaghy.

Q. Are those the two claims in controversy in this case?

A. Yes, sir.

Q. Now, I will ask you the question, Mr. Cahoon, as to where, in relation to these two claims that are in controversy, was it that Hackley discovered gold.

A. On the Hackley claim.

Q. You heard the testimony of Mr. Sutherland here the other day on the stand, wherein he testified that he was the first one to
99 discover gold on either one of these two claims in controversy. Is that true?

A. It is not true.

Q. Did you hear the testimony of Mr. Sutherland on the previous trial of this case at Skaguay?

A. I did.

Q. Do you remember what Mr. Sutherland testified upon that trial as to who was the first party to discover gold upon either one of these claims?

A. He wasn't positive as to whether he did or Mr. Hackley.

Q. Can you indicate to the jury on this map and plat about what portion of the Hackley claim it was that Hackley at this time discovered gold?

A. It was very nearly the upper end of it.

Q. Who, if any one, during this time while you was there discovered any gold on the McConaghy claim, adjoining the Hackley claim?

A. Mr. Hackley did.

Q. Now, Mr. Cahoon, just state briefly to the jury, then, what took place there after this.

A. When he discovered gold on the 5th it was nearly night, and we went back into camp on the bench where we first left the Porcupine creek, and stayed there that evening, and Mr. Henry went down and notified the rest of their party that we had discovered gold.

Q. What party?

A. The party with Mr. Henry and Hackley. The next morning we went back into the creek and was prospecting the creek,
100 and I started to write a notice on a snag that was standing up in the creek, and I put on that snag, I, the undersign-, claim 1,500 feet, on one side signed William A. Chisholm's name to it, and I wrote on the other side of the snag the same writing up the creek and signed Mr. Hall's name to it.

Q. Had you had any conversation with Hackly prior to this time about this claim which is referred to as the Hackley and McConaghy claims?

Counsel for the plaintiff objected to the above question for the reason that the same is incompetent and immaterial and that defendants cannot manufacture testimony that way.

Objection overruled by the court.

A. Mr. Hackley objected to my putting any notice there, saying that he had discovered the gold on the claim; and I explained to Mr. Hackley my reason and told him that other parties might be coming up while he was prospecting up the creek, and possibly some one might come in here and stake this ground, and I said, I will just put that here as a temporary location, a temporary notice. Well, he says, I want this ground, and I says, So far as I am concerned we will have no trouble about that; you want the ground, and I shall move my stake that I put on there.

Q. Now, about where was this writing on this snag placed in regard to the McConaghy and Hackley claims as they are now located and in regard to where Hackley had discovered gold?

101 A. A little above that.

Q. State about where you marked on that snag.

A. The snag is about there; a little south of east of what is marked on this map as the McConaghy and Hackley claims.

Q. What was Hackley and Sutherland doing at the time you put this writing on that snag?

A. They were prospecting and panning.

Q. About what distance away were they?

A. I couldn't say. They were scattered along there probably 100 feet or so.

Q. Could you see whether or not or do you know whether Mr. Hackley saw you when you made that writing?

A. I think he was below the stake, and he came and asked me what I put that on there for when we started up the creek.

Q. What reply did you make?

A. I made the reply as I have just stated.

Q. Besides the conversation you have just stated, was there anything else that took place there at that time between you and Hackley and Hanson and Sutherland or any or all of you on that day?

A. Why, we continued up the creek.

Q. What day of the month did you say this was?

A. On the 6th of October.

Q. About what time during the day?

A. In the forenoon.

Q. Then what else did you parties do on that day?

A. We went up the creek, and I put another notice up for Mr. Hawes, my old partner; just the same way.

102 Q. Where was that location that you made for Hawes then?

A. It covered this claim, a part of this here, called the Wooden claim, and a part of this fraction that is in there, and the Hansen claim.

Q. Was it adjoining the McConaghy and Hackley claims, the two in controversy in this case?

A. Yes, sir.

Q. What did Hansen and Sutherland do that day?

A. We went up the creek, and Mr. Sutherland, after we got up to the other falls, he said, I am going to stake from here down the creek.

Q. Where do you mean?

A. There is a falls up here between claims marked 6 and 7, and he staked down the creek 1,300 feet, and I staked up the creek from that falls on one side of a tree and he on the other.

Q. Is that all that took place that day?

A. Mr. Hanson staked down and overlapped the Hawes claim.

(By the COURT:)

Q. Did that make a solid continuation of claims?

A. Yes, sir; a solid line of locations.

Q. Making about as is shown on the map there?

A. Yes, sir; nearly the same, I should judge. We had no exact way of measuring our claims.

Q. Up to that time had the claims marked Chisholm and Hall, on the upper part of the creek, been laid out?

A. No, sir. We were expecting to do it.

Q. So it made a chain of claims commencing with number 1 and running up the creek until you reached number 7?

103 A. Yes, sir.

Q. Did you do anything else that day?

A. No, sir; nothing else was done. We came back and went up Cahoon creek, and it was so late that I got separated from the other boys and I got back to camp, and the other boys laid out all that night at the mouth of Cahoon creek.

Q. That the night of the 6th?

A. Yes, sir.

Q. What took place on the 7th?

A. I found the other boys.

Q. Who do you mean?

A. Mr. Lewis, McConaghy, West, and Wooden had gone up the creek and was in camp when I got back after dark; the next day Hanson, Hackley, and Mr. Sutherland—they came in about noon.

Q. You all got into camp what day?

A. Into the camp on the bench on McKinley and Porcupine creeks.

Q. Now, have you heard the testimony of Mr. Hall and Mr. Chisholm about these two location notices which are marked Plaintiff's Exhibit C and Plaintiff's Exhibit B? You have heard the testimony of Mr. Hall and Mr. Chisholm about these location notices?

A. Yes, sir.

Q. As being, as near as they could figure out, copies of the notices placed on the snag which appears on the McConaghy and Hackley claims?

A. Yes, sir.

Q. I will ask you if these are anything like the copies of
104 anything you wrote upon this snag.

A. No, sir.

Q. Now, state just as plainly as you can what the Hall notice and what the Chisholm notice consisted of as written there by you, as you stated awhile ago.

A. I, the undersign-. claim 1,500 feet running down this creek and 300 feet on each side. Signed W. A. Chisholm.

(By the COURT:)

Q. Any date?

A. Dated October 6th.

Q. What about the other one?

A. The other one is the same and signed by Peter Hall.

Q. What kind of a pencil did you use?

A. A common black lead pencil.

Q. Did you have any indel*la*ble pencil?

A. No, sir.

Q. Any indel*la*ble blue pencil?

A. No, sir. I had nothing of the kind with me.

Q. About where was Sutherland and Hackley prospecting at the time you did this writing in regard to these two claims in controversy?

A. I should judge about 100 feet from there.

Q. On which one of the claims?

A. On the Hackley claim.

Q. What was your intention of putting that notice on that snag?

Counsel for the plaintiff objected to the above question for the reason that the same is improper and immaterial, and the
105 notice speaks for itself as the acts of the agent.

By the COURT: I think the intention must be determined by the jury as a question of fact. The witness might say that I put it there for such and such reason; it wouldn't be binding on the jury; the jury must find that out from the acts themselves. The objection is sustained.

Counsel for the defendant duly excepted to the ruling of the court.

Q. It was after you did this writing upon there that you had this conversation that you had with Hackley?

Counsel for the plaintiff objected to the above question for the reason that the same is leading.

Question withdrawn.

Q. When was it in regard to the time you put this notice upon there that you had this conversation with Hackly?

A. After that; after we had started up the creek.

Q. You came down to the camp the next day, the 7th. Now state what was done then.

A. Mr. Hackley and Mr. Hansen and Mr. Sutherland came in about noon, and Mr. Hackley made a further discovery on his way in, and he had a very fine sample of gold which he discovered on the claim as now located as the McConaghy claim, and we got to talking the matter over amongst ourselves, and the boys were all there then, Hanson and Sutherland and Lewis and McCona-
106 ghy, West, and myself, and we came to the conclusion it was very——

Q. Never mind the conclusion. State the conversation you had with Hanson and these people about any of these in controversy.

Counsel for the plaintiff objected to the above question for the reason that the conversation would not be binding upon Chisholm and Hall, and it does not bind the plaintiff; that Hanson had nothing to do with the claims at that time.

By the COURT: It might become material if they show that Chisholm and Hall ratified it afterwards.

By Judge WINN: That is what we want to do, your honor.

Q. Now, just state briefly, without any conclusions or preludes, as to what conversation took place at this time.

A. Well, we had a very fine prospect, and we thought we would get at it in a business manner, and we talked about going into a company and throwing all our claims together.

Counsel for the plaintiff objected to that portion of the above answer relative to going into a company for the reason that the same cuts no figure in reference to the location of these claims, and that the matter is foreign to the issues in this case.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted. 107

Q. What else took place there at that time, Mr. Cahoon, leaving out the question as to partnership——

By Judge WINN: If the court please, I would like to complete my record on the question your honor has just ruled and save my exceptions?

By the COURT: Yes; you can make what record you want.

Q. Now, was there any talk had at that time or any conversation had about you and the other parties who now constitute the McKinley Creek Mining Company and Chisholm and Hall going into a partnership to work and operate the claims that had been staked out by you and Hanson and the other parties previous to this date?

Counsel for the plaintiff objected to the above question for the reason that the same cuts no figure in reference to the location of these claims in controversy, and that the matter if foreign to the issues in this case, and on the further grounds that the same is incompetent, irrelevant, and *incompetent.*

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. I will ask you, following up that conversation, as to whether any such a conversation did take place, that you afterwards communicated this to Hall and Chisholm. 108

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, irrelevant, and incompetent.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. I will ask you whether or not if you did do so that Hall and Chisholm ratified and agreed as to what conversation you had down there.

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, irrelevant, and incompetent.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Now, Mr. Cahoon, I wish you would go ahead and state to the jury what else took place at this time and any conversation that took place, leaving out the question about the McKinley Creek boys and Sutherland and Hanson and Chisholm and Hall and Dalton going into a copartnership with you boys.

A. The question arose as to whether that power of attorney I had was legal and would hold. We didn't know. It was drawn up in British Columbia, and there was some doubt as to whether that was legal or would hold in case any claims were staked. 109

Q. Well, Hanson and Sutherland were present, were they?

A. Yes, sir.

Q. What else took place between you people present?

A. Mr. Hackley wanted to know why I didn't take that stake down.

Counsel for the plaintiff objected to the above answer for the reason that the same is immaterial.

By the COURT: What you can show is what he did towards attempting to remove that location; find out what he did.

Q. What did you do?

A. I told him it was late the evening before and dark and I couldn't do it, and I told him I would take them do-n.

Counsel for the plaintiff objected to the above answer and moves that the same be stricken out for the reason that the same is incompetent and irrelevant and immaterial.

By the COURT: The testimony on the part of the plaintiff was that Hackley was standing by and didn't object, and this witness doesn't claim that he did object until he came along some time afterwards.

By Judge WINN: That was the first time he knew it.

110 By the COURT: This witness says he knew it the 6th; this was the 7th. I will grant the motion to strike it out.

Counsel for the defendant duly excepted to the ruling of the court.

Q. Now, did you have any conversation there with Hackley at this time about these notices that you had written upon this stump that you have stated wherein you put the name of Hall on one and Chisholm on the other at this time in the presence of Sutherland and Hanson, two of the plaintiffs in this case?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, incompetent, and irrelevant.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. What other conversation did you have there, Mr. Cahoon?

A. I don't know. They object to every conversation we had.

Q. I will ask you if you had any conversation with Hackley and Hanson and Sutherland in regard to these two claims in controversy, and as to whether or not that conversation was afterwards communicated to Hall and Chisholm.

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, irrelevant, and incompetent.

Objection sustained by the court; to which ruling counsel

111 for the defendant then and there duly excepted.

Q. State what other conversation you had there.

A. I instructed Mr. Lewis to stake Mr.——

Counsel for the plaintiff objected to the witness stating what he instructed Mr. Lewis or anybody else to do.

Objection overruled by the court.

A. I instructed Mr. Lewis to stake Mr. Hall, Mr. Chisholm, and Mr. Hawes on the upper end of the creek—that is, after all the boys that were in the creek had staked—and I instructed him to take the notice off that I had put on that snag.

Q. Did you afterwards, Mr. Cahoon, ever see any stake *in* pursuant to this instruction that Lewis set for Chisholm and Hall?

A. Yes, sir.

Counsel for the plaintiff objected to the above question and answer for the reason that there is nothing in the evidence to show that the witness had ever instructed Lewis to make any locations.

By the COURT: He has just testified that he instructed him to locate all three of them. The objection is overruled.

Q. Whereabouts did you see these stakes set? Give the number of the claim.

A. No. 11 was staked for Mr. Hall and No. 12 was staked for Mr. Chisholm.

Q. Was Hawes' claim staked that day?

112 A. His claim is where it is on the map.

Q. Is that the same Hawes that you came to the country with?

A. Yes, sir; the same man.

Q. Now, was there anything else that took place, leaving out the question of partnership at the camp, before you and Hanson and Sutherland left for Camp Pleasent?

A. We made an agreement with the boys in the creek to meet them at Boulder creek the next Sunday afternoon. This was Friday, and Mr. Hansen and Mr. Sutherland and myself went back to Pleasent camp and notified the boys what we had done.

Q. State when you got back to Pleasent camp who you met there, and what conversation you had, if anything.

A. I met Mr. Hawes and Mr. Hall and Mr. Chisholm, and we talked the matter over, and I told them just what I had done.

Q. State to the jury and the court the words you used without stating any conclusions.

A. I told Mr. Hall and Mr. Chisholm and Hawes that I had put up a temporary notice in the creek—that is, told them just how I had worded it, and everything, and that there was an objection raised as to whether the claims would be legal under that writing given there in British Columbia, and that we had decided to form a company, and we thought the proper thing to do was to stake the claims of the boys in the creek—both the plaintiff and the defendant in this suit; stake what boys were in the creek; let them stake first, and then stake these three claims at the upper end of the creek.

Q. What three claims?

113 A. Mr. Hall, Mr. Hawes, and Mr. Chisholm, and in case they couldn't hold these claims it wouldn't leave a gap in the ground that we had staked.

Q. Hawes had remained at Pleasent camp and you had taken his power of attorney along?

Counsel for the plaintiff objected to the above question for the reason that the same is leading.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Did Hawes remain at Camp Pleasent?
A. Yes, sir.
Q. Go ahead and tell the conversation you had.
A. I told them my reason for doing so, and told them in case they couldn't hold these claims we would give them an equal portion with us.
Q. Them, who?
A. Mr. Hall, Mr. Hawes, and Mr. Chisholm.
Q. Now, was there anything said there, Mr. Cahoon, about the discovery of gold or anything about Hackley claiming the lower claims?
A. Yes, sir; I told them that Hackley found the gold there, and that it was the proper thing to do, and that I had instructed Mr. Lewis to do it; I told them everything word for word as I tell it here in court, and they agreed to it.
Q. How long did you stay at Pleasent camp this time?
A. This was Saturday morning, on the 8th, about half past
114 nine, I should judge, and we staid there until Sunday *morning, on the 8th, about half past nine, I should judge, and we staid there until Sunday* noon.
Q. Did you have any other conversation about these claims in controversy with Hall and Chisholm or Sutherland there at this time after you got back and before you started for Boulder creek?
A. No; nothing about this.
Q. Well, was this all the talk you had then upon this subject of claims before you left Pleasent camp with these other boys, Hanson, Chisholm, and Hall?
A. That evening, on the 8th, Mr. Dalton came down from the interior and Mr. Chisholm came to me and he says, Don't you think it would be to our advantage to take Mr. Dalton into our company? and I told him, so far as I was concerned, I was willing to take Dalton in, as he was an old timer.

Counsel for the plaintiff objected to the above answer and to the witness stating anything about a company or taking in Jack Dalton for the reason that the same is incompetent and immaterial.
Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Was there any conversation had there with Hall and Chisholm and Dalton, members of this plaintiff company, in regard to forming a copartnership to work and operate this bunch of claims that had been staked out together?

115 Counsel for the plaintiff objected to the above question for the reason that the same is incompetent, immaterial, and irrelevant.
Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Now, leaving out the question, then, of any partnership arrangement that was had between you and these parties last mentioned, go ahead and state to the jury if anything else was said about

these claims in controversy at this time before you left Camp Pleasent.

A. We were to meet the other boys at Boulder creek on the evening of the 9th and all go down to Chilkat and draw up the papers for this company.

Q. Was that where you started for?

A. Yes, sir. The arrangements had been made before we left the creek.

Counsel for the plaintiff objected to the above answer for the reason that the same is incompetent, immaterial, and irrelevant.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Now, did you hear the testimony of Hanson and Sutherland and Hall and Chisholm when they testified before in this case?

A. Yes, sir.

116 Q. Did either one of these parties state one syllable or word about when you left there that you started to go down to Pyramid Harbor and make out location notices and go to Juneau and record them?

A. No, sir.

Q. What did they testify they went to Pyramid Harbor for?

A. To form this company.

Q. Do you remember of their being questionsd closely upon the proposition what they went to Pyramid Harbor for?

A. Yes, sir.

Q. What did they testify, these witness I have just name-, on the previous trial they went for?

By the COURT: He answered that a minute ago.

Q. Where did you meet these parties then?

A. We got down to Boulder creek and they didn't arrive there, and we waited that evening, and the next morning Mr. Hawes, Mr. Hall, and Mr. Chisholm and Mr. Sutherland started on down to Sunshine, and I went over to see what had become of the boys. Mr. Hanson was with me, and we met them at the junction of McKinley creek.

Q. Give the names.

A. Mr. Hackley, Mr. Lewis, Mr. Leitch, Wooden, West, and McConaghy; they were on their way out; we staid at the mouth of the Porcupine that night, and the next morning we proceeded to Sunshine, where we met Mr. Hall, Mr. Hawes, Mr. Chisholm, and Mr. Sutherland, who had gone on the day before. On arriving at Sunshine Mr. West, Mr. Hanson, and myself proceeded the pack

117 train, and the other boys, McConaghy, Hackley, Leitch, Wooden, were behind with the pack train.

Q. You can cut that short and tell where you and Hall and Chisholm and Hanson and the rest of the boys who form the defendant company next met.

A. Met at Sunshine.

Q. Now, in the presence of these parties, what took place—what conversation was had?

A. Mr. Hall came to me on my arrival there and said that Mr. Chisholm said he couldn't conscientiously go on the stand and swear he had a claim, because I had instructed——

Counsel for the plaintiff objected to the above answer for the reason that the same is immaterial, irrelevant, and incompetent.

Objection overruled by the court; to which ruling counsel for the plaintiff excepted.

A. He couldn't conscientiously swear he had a claim, because he had given me a power of attorney and Mr. Lewis had staked the claim up there, and I says, I didn't see why it cut any figure, and when the other boys came up we would talk the matter over, and upon the arrival of the other boys, with the exception of Hackley, who went on with the pack train.

Q. You heard Hall testify on the stand that you told him some of the boys had jumped or staked over his claim. Did you tell him any such thing?

A. No, sir.

Q. The conversation that was had is the one just related?

118 A. Yes, sir; that was the conversation that took place; we walked up there to the camp, and Mr. Hawes and Mr. Chisholm was there at the camp.

Q. Do you know whether any one else was present and heard that conversation?

A. We talked it right over after that with Mr. Chisholm and Mr. Hall and Mr. Hawes.

Q. What was said then?

A. The same thing, and when the boys came up we brought the matter up, and I told them I didn't think there was any cause for any trouble.

Q. Now, that was in regard to Lewis staking what claims?

A. These three upper claims.

Q. Was it in regard to Lewis staking any claims in controversy?

A. No, sir.

Q. Now, tell what was next done between you and Hall and Chisholm and Sutherland and Hanson and all the parties who form the defendant company, with the exception of Hackley.

A. We had a meeting there in Mr. Buckman's cabin, in Camp Sunshine, and talked the matter over, and Mr. Chisholm and Mr. Hall explained why to the boys they didn't think they didn't have any claims there.

Q. Tell what Hall and Chisholm said.

Q. They said they didn't think they had any claims on account of my telling Lewis to stake them instead of my staking them myself, and we talked the matter over, and I suggested that I would go back and restake these claims over myself, and Mr. Hall says——

Q. State what *to* claims.

119 A. Mr. Hall's and Mr. Chisholm's.

Q. What numbers?

A. Marked 11 and 12. Mr. Hall said, If you will go back, I will pay you wages and I will furnish the grub, and Mr. Lewis offered

to go back with me, and Mr. Hall furnished me the grub, and I told him that I had started out to do it right and I would do it if it took me all the fall, but that he could furnish the grub, and Mr. Lewis spoke up and said, I will go back with you. Mr. Lewis' blankets had gone on, and Mr. Hanson gave Mr. Lewis his blankets and pack-strap to go back with me, and Mr. Lewis and I before we left agreed to meet the other boys at Chilkat. We thought we would be back in a couple of days, and we started back up there, and the other boys in the company all went down to Chilkat, and they waited there.

Q. For what purpose were you to all meet down at Chilkat again?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, incompetent, and irrelevant.

By the COURT: I cannot tell until I get the answer.

By Judge WINN: It is in contradiction that they were going down to have notices made out and record them.

A. We were going down there to draw up the papers for this company.

Counsel for the plaintiff moved to strike out the last answer for the reason that the same is immaterial, incompetent, and irrelevant.

120

(By the COURT:)

Q. Was Mr. Chisholm and Mr. Hall present?

A. Yes, sir.

By the COURT: It is not material on the line to show *of* the forming of the company, but it might be material as tending to contridict the witnesses of the plaintiff.

Q. Was any wor*k* or syllable spoken there at this time with Sutherland, Hanson, Hall, and Chisholm about going down to Pyramid Harbor for the purpose of having location notices made out and recorded at Juneau?

A. No, sir.

Q. State what you and Lewis did after you left there.

A. We went back up and rewrote the notices on the 14th of October on these two particular claims of Hall and Chisholms.

Q. And numbered what?

A. Number 11 and 12.

Q. Did you see at this time the monument and stake that Lewis had previously set there?

A. Yes, sir.

Q. Explain to the jury what this mongment and stake on these two claims was.

A. Stones piled up.

Q. State what stake was there.

A. A monument of stones piled up and a flat stone on the top; it was above timber line.

Q. What was written on there?

121 A. There was written on there a notice for Chisholm and one for Hall.

Q. Now, how many monuments were set—did you set any more?

A. There was one at the end of Hawes' claim—the starting of Mr. Hall's claim.

Q. That is on the boundary between the two?

A. Between Mr. Hall's and Mr. Hawes', and there is one between the boundary of Hall's and Chisholm's.

(By Mr. MALONY:)

Q. Is that the monument in the creek bed?

A. Yes, sir.

Q. Do you know whether these monuments are there yet or not?

A. Yes, sir.

Q. Are they there?

A. They were there this summer.

Q. Do you know the probable relative value of the claims where the two claims are in controversy and these three other claims you have just last named?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial and irrelevant. Objection overruled by the court.

A. My experience is that the upper claims have been as valuable as the lower ones.

(By the COURT:)

Q. Did you know, on the 6th or 7th of October, the relative value of this property?

A. No; I didn't know the relative value of them.

Q. You didn't know whether one was any more valuable than the other?

122 A. No; I didn't know whether one would be more valuable than the other.

Q. When did you leave up there and where did you start for?

A. For Chilkat.

Q. To meet whom?

A. Mr. Chisholm, Mr. Hall, Mr. Hawes, West, Wooden, and Hanson.

Q. The same parties who had left the camp when you went up the creek?

A. Yes, sir.

Q. Who did you meet and where did you next see Hall and Chisholm or any of these parties?

A. We got down to Chilkat on the night of the 17th and I learned——

Q. Don't say what you learned.

A. Mr. Hall, Mr. Chisholm, Mr. Hawes, and Mr. Dalton had crossed over that evening, pretending to go out to hunt for Lewis and I. I didn't see them.

Q. Did you ever have any conversation with Hall and Chisholm afterwards?

A. Mr. Hawes told me——

Q. Who did you meet, if any one?

A. I met Mr. Leitch, Mr. Wooden, McConaghy, West, and Mr. Hackley; no, Mr. Hackley wasn't there.

Q. Wasn't where?

A. At Chilkat; I came on ti Chilkat.

Q. When you got there was any one of the other boys who form the plaintiff company there?

A. They were not there.

123 Q. Did you ever see Mr. Hall or Mr. Chisholm since then and have any conversation with either one of them in regard to these claims in controversy?

A. I started to have a conversation in Juneau here with Mr. Hall, but was interrupted.

Q. Now, Mr. Cahoon, state briefly to the court and jury what work has been done upon these claims in controversy, including the Hackley and McConaghy claim.

A. We whip-*ed*sawed something over four thousand feet of lumber and built a trail the whole length of them; we put in a flume, which was broken twice on the claim by their rolling boulders down onto us.

Counsel for the plaintiff objected to the witness stating anything about any boulders being rolled down. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. You built a flume?

A. We built a flume 110 feet.

Q. Give all the improvements on these claims.

A. We cut a tail race—worked a number of days cutting a tail race in the spring early to get ready to work before high water came up on the Hackley claim.

Q. About what is the valuation of your work and labor and material all taken together?

A. Several thousand dollars.

Q. Did you have any extra help besides the boys in your own company?

A. A part of the time we had some outside help.

124 Q. While you were improving were the other boys belonging to Dalton's company *were* working on there in another place?

A. Yes, sir.

Q. When was the first you ever knew of Dalton's company or the plaintiff's company—when did you know of their doing any work upon either one of these claims in controversy?

A. I think it was in May—the last of May.

Q. What year?

A. '99.

Q. What improvement, if any, have they put upon the claim referred to as the Hackley claim?

A. Nothing whatever, with the exception of a number of days' work of two men.

Q. That is all that the plaintiff company have done on the Hackley claim?

A. Yes, sir.

Q. Did you hear them testify to several thousand feet of flume on this claim?

A. It is not on the claim.

Q. Where is it?

A. On the side hill.

Q. Off of both of these claims?

A. Off of both of these claims.

Q. Mr. Cahoon, you spoke to me during the recess house that you wanted to make some explanation about some feature of your testimony; state what it is.

A. Mr. Hackley and I had had a talk about my not staking there. Mr. Hackley told me before I staked not to stake. I told Mr. Hackley I had this power of attorney and thought I would stake
125 them there, and he told me not to stake them; he thought he could hold that ground without that.

Q. That was before the writing was done on the snag?

A. At the time I spoke about writing first I told him it was only just a preliminary staking that——

Q. You went over that this morning?

A. Yes, sir.

Q. Did you hear Mr. Hall testify on the previous prial in this case as to whether or not he knew for what purpose that you and Lewis went back up the creek when you left Sunshine camp, and you and Lewis went back up the creek and the other crowd left for Pyramid Harbor?

A. He didn't know what we went back for.

Cross-examination by Mr. MALONY:

Q. You had a little conversation with your attorney at noon?

A. Yes, sir.

Q. Did you testify this morning that the first conversation you had with Mr. Hackley was after the staking of this claim, after the staking had been made up the creek?

A. You objected so much——

Q. Answer my question yes or no.

A. Yes.

Q. You did?

A. Yes.

Q. You testified the first conversation was after you made the staking on the way up the creek?

A. Yes, sir.

126 Q. You had a conversation with your attorney since?

A. Yes, sir.

Q. You change your testimony now? Answer yes or no.
A. Yes; I do.
Q. Look at that. Have you ever seen that instrument before?
A. Yes, sir; I have.
Q. State to the jury what it is.
A. It is a writing that I drew up myself in the shape of a power of attorney.
Q. From whom?
A. Mr. Hawes, Mr. Chisholm, and Mr. Hall.
Q. Were these witnesses present at that time?
A. Yes, sir.
Q. Where was it drawn up?
A. At Camp Pleasant.
Q. Did you act under this power of attorney for Messrs. Hall and Chisholm?
A. I acted under that.
Q. Was there any other power of attorney drawn up, save this one?
A. No, sir.
Q. Did they ever delegate any other authority except this?
A. Later on they did.
Q. Tell us when and where.
A. At Sunshine.
Q. In writing?
A. No, sir.
Q. After this location was made here?
127 A. There is no location on that.
Q. Was it after the 6th day of October, '98?
A. Yes, sir.
Q. That authority was not in writing?
A. No, sir.
Q. Where were you on the 4th day of October, '98?
A. Pleasant camp.
Q. Who else was there with you?
A. Mr. Hawes, Mr. Hall, Mr. Chisholm, Mr. Sutherland, and myself.
Q. What were you doing at that time? In whose employ were you?
A. Mr. Dalton's.
Q. Were you in the employ of Mr. Dalton or Mr. Chisholm?
A. I was given to understand I was in the employ of Mr. Dalton.
Q. Don't you know Mr. Chisholm had a contract for building that house, and that Mr. Dalton had nothing to do with it?
A. No, sir; I didn't know it.
Q. Who hired you?
A. Mr. Chisholm.
Q. How long did you work there?
A. Sixteen days and a half, I think.
Q. When did you first hear that a discovery had been made on Porcupine creek?
A. In the Northwest Territory, come time, I think, in August.

Q. From whom did you hear it there?
A. I couldn't say.
Q. Then you came down as far as Pleasent camp?
A. Yes, sir.
Q. You didn't press right on to Porcupine creek at all?
128 A. Mr. Hall said Mr. Chisholm wanted a couple of men to whip-saw lumber, and I went to Mr. Chisholm and Mr. Chisholm said, I will employ you for a week, and we decided to stay there for a week. We were on this side of the devide and we decided there was no danger of getting snowed in and we kept staying along as long as the job lasted.
Q. From there you went down to Porcupine creek?
A. Yes, sir.
Q. Who went with you?
A. Mr. Hanson and Mr. Sutherland.
Q. Before you went down you drew up the power of attorney?
A. Yes, sir.
Q. Did you have any conversation with Chisholm and Hall at that time?
A. Nothing more than I offered to stake them if I found anything.
Q. Did you state in your testimony this morning that you offered as a matter of courtesy?
A. I did.
Q. Did they put up any consideration?
A. There was nothing said about any consideration.
Q. Did they put up any consideration?
A. I don't consider they did; they had some provisions and I had some of my own.
Q. They put up some grub?
A. They put up some.
Q. Did Hanson and Sutherland have any power of attorney to stake?
A. No, sir.
129 Q. Did they put up any grub for you?
A. They put up grub for all three; I took part of my grub.
Q. I will ask you what kind of grub did they put up; name the character of the grub.
A. They put up some sugar, some flour, and, I think, some butter.
Q. Anything else?
A. We didn't take any beans on that trip; I don't remember the nature of what they put up.
Q. Did you tell the jury that Mr. Hall had a cache and he was afraid his grub would spoil?
A. Yes, sir.
Q. That is the character of grub that spoils?
A. It was grub that laid all summer and had been wet.
Q. Do you deny now to this jury that Mr. Hall and Chisholm outfitted you?
A. I do.
Q. Do you deny that they gave you provisions?
A. I don't deny that I had some provisions.

Q. What was it you stated to Hall about this outfit?
A. What did I say to him?
A. Yes.
A. I didn't say anything to him; he offered—he said, I have got some provisions in a cache if it is any use to you; I bought it of Dalton, and you can use it so it won't spoil.
Q. Did you testify up at Skaguay that you didn't deny that Hall and Chisholm gave you a part of your outfit and you had a part yourself?
130 A. I don't remember what I testified as to that.
Q. Will you testify now that you didn't testify to that fact?
A. I didn't testify that they didn't give me a part; they furnished some grub and some I had; I furnished some and so did Mr. Sutherland and Mr. Hanson.
Q. Sutherland and Hanson had no agency?
A. No, sir.
Q. You ate a part of their grub while you acted under this power of attorney?
A. Yes, sir.
Q. You arrived on the 4th of October?
A. Yes, sir.
Q. Where did you camp?
A. At the mouth of Porcupine.
Q. What did you do the next day?
A. Went up the creek and got into McKinley creek on the afternoon of the next day.
Q. Whom, if anybody, did you meet at that time?
A. I met Mr. Hackley, Mr. Henry, Mr. West, Mr. Lewis, Leitch, Wood, and Mr. McConaghy.
Q. Where did you meet them?
A. Below the mouth of McKinley creek.
Q. Which way were they going at that time?
A. Going down the creek.
Q. Did you meet them below the falls or above?
A. Below the falls.
Q. Will you point out to the jury about where the falls are there?
131 A. The falls are here, right about 150 or 200 feet from where the Porcupine comes down.
Q. You met these people below the falls. What, if anything, did they say about where they were going?
A. They didn't say where they were going; npt at that time.
Q. Did they turn back when you met them?
A. No, sir; we came down the creek and was going up a little gulch below there.
Q. How far below? Point out.
A. It is just about 700 feet below the mouth of the creek—below the falls—below where McKinley creek goes into the Porcupine creek; there is a little gulch, and I met them this side of that gulch.
Q. Did Hanson and Sutherland accompany you?
A. Yes, sir.

Q. They were from up the Porcupine?
A. Yes, sir.
Q. After you got down to that creek what did you do next?
A. We went up on the bench.
Q. Did all hands go?
A. There was Mr. Hackley, Mr. Henry, Hanson, Sutherland, and myself.
Q. When did you first go up McKinley creek?
A. We got into McKinley creek that evening.
Q. The 5th of October?
A. Yes, sir.
Q. Did you go up that evening upon any of the claims now in controversy?
A. Yes, sir.
Q. Who was present at the time you went on these claims?
132 A. Mr. Hackley, Mr. Henry Sutherland, Hanson, and myself.
Q. Did you follow the creek or on the bank?
A. Followed up the creek after we got into the creek.
Q. You had to first get on the bank?
A. Yes, sir.
Q. Who was the first man in the creek?
A. Mr. Sutherland and I went down a slide; Mr. Hackley was down in the creek.
Q. Is it now a fact that you and Sutherland were in the creek before Hackley and the other parties?
A. Yes; we were.
Q. Is it not a fact that Sutherland started prospecting when he got down in the creek?
A. No, sir.
Q. When was the first prospecting that you saw done?
A. Mr. Hackley, with his pick, was picking in the crevices.
Q. How long after you and Sutherland got into the creek?
A. We expected to meet them further up, and we went up where we could meet them and Mr. Hackley was there.
Q. This McKinley creek is a branch of the Porcupine?
A. Yes, sir.
Q. You knew of discoveries being made on the Porcupine?
A. Yes, sir.
Q. Did Sutherland do any prospecting there?
A. After we got back——
Q. Answer the question yes or no.
A. No; not at that time.
Q. When did he do it?
A. After we got back down the creek.
133 Q. How long after?
A. Right away after Mr. Hackley showed where he took out the gold.
Q. How long before Sutherland commenced prospecting?
A. We both started prospecting.
Q. Did he find anything?

A. We both took gold out of the crevice that Mr. Hackley had discovered.
Q. What was Hanson doing?
A. He was prospecting, too.
Q. As a matter of fact, all hands were prospecting at that time?
A. After we got back down there.
Q. That was on the 5th of October?
A. Yes, sir.
Q. Did Hanson, Sutherland, Hackley, or yourself make any location on the 5th of October?
A. No, sir.
Q. Where did you go on the evening of the 5th of October?
A. We went into camp up on the bench; we had left our blankets there.
Q. Did you stay there the evening of the 5th?
A. Yes, sir.
Q. Where did you go the next morning?
A. Down in the creek.
Q. Who went back with you?
A. Mr. Sutherland, Hackley, Hanson, and myself.
Q. What time did you leave camp?
A. Why, as soon as we could get our breakfast; after daylight.
134 Q. What time did you go upon the premises marked as the Chisholm and Hall claim?
A. We didn't go up there that day.
—. ——.
A. I first went up there on the 14th.
Q. Did you go upon the claims marked Hackley and McConaghy on the 6th?
A. I went on them on the 6th—the morning of the 6th.
Q. Who was with you at that time?
A. Mr. Hackley, Sutherland, Mr. Hanson, and myself.
Q. What did you do, if anything, there on that date?
A. I started to put up a temporary notice and Mr. Hackley objected.
Q. Did you put up a notice there?
A. I put up a preliminary notice.
Q. State to the jury what you put it on.
A. On a snag on the edge of the water.
Q. On one side did you put up a notice for Chisholm?
A. Yes, sir.
Q. State to the jury what you put in the notice.
A. I put in the notice I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side.
Q. Anything else?
A. No, sir.
Q. The date?
A. Except the date, October 6th.
Q. The year?
A. '98.

Q. Are you sure that is all you put on it?
A. Yes, sir.
135 Q. How is it you remember it so distinctly, word for word?
A. Because I just put up a preliminary notice in a- few words as I could.
Q. Did you testify to that before?
A. I don't know.
Q. Did you put up any other notice?
A. Yes, sir; on the other side of the stake for Mr. Hall.
Q. What was on that?
A. The same.
Q. Did you put up these notices under and by virtue of that power of attorney?

Counsel for the defendant objected to the above question for the reason that the same is not proper cross-examination and is calling for a conclusion of the witness.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Did you put up these notices under and by virtue of that power of attorney?
A. Yes, sir.
Q. That, I understand, was on the 6th of October?
A. Yes, sir.
Q. At the time you put up that notice where was Mr. Hackley and where was Mr. Hanson and Mr. Sutherland—who was the other man?
A. They were right there in the vicinity there.
Q. Did you chop off the side of the tree?
A. Yes, sir.
136 Q. Were they there close by when you chopped that off?
A. I think Hackley was there.
Q. Were any of the others there?
A. I don't know positive whether they were or not.
Q. Don't you know you testified before Hackley wasn't present?
A. No, sir.
Q. What did Hackley say to you?
A. I told him I had a power of attorney for Mr. Hawes and Mr. Chisholm and Mr. Hall, and I thought I had better put a notice on here, and he told me not to, and says, I want this ground. I am prospecting, and I have a right to hold it.
Q. And in the face of this opposition you went on?
A. I explained to Mr. Hackley why I was doing it.
Q. Mr. Hackley was perfectly satisfied, of course?
A. No, sir; he didn't act as though he was satisfied, but I was looking out for my interest.
Q. You chopped off on the other side there?
A. Yes, sir.
Q. Mr. Hackley present?
A. Yes, sir.
Q. Any of the others there?

A. They were right around there.
Q. They were not at such a distance they could not hear you?
A. That I couldn't tell.
Q. Do you know whether they overheard you or not?
A. I do not.
Q. Did Mr. Hackley make the same objection to the notice on the other side?
137 A. I couldn't say as for that. I don't see how he could raise any more objection than he did.
Q. Now, then, I will ask you again if you testified this morning that Mr. Hackley didn't say anything to you until after you had these notices on that tree and you were on your way up the creek.
A. Yes, sir; I testified to that.
Q. And during the noon hour you had a conversation with your attorney?
By the COURT: He has been over that. You can argue that to the jury.
Q. Where did you go after you left these claims in dispute here on the 6th?
A. Went up the creek.
Q. How far up did you go?
A. Went up as far as claim No. 7.
Q. Claim No. 7?
A. Yes, sir.

(By the COURT:)

Q. Whose claim is No. 7?
A. My claim.
Q. That is as far as you went?
A. Yes, sir.
Q. After the protest of Hackley, did you stake on that day any other claims for Chisholm and Hall?
A. No, sir.
Q. Why not, if Mr. Hackley objected and you only made that temporarily?
A. Because we didn't have time.
Q. Did you state anything on Cahoon creek?
138 A. No, sir.
Q. Did you stake anything further for Chisholm and Hall before you went to Camp Pleasant?
A. I have explained because I instructed Mr. Lewis to make the locations up here.
Q. Look at that power of attorney and see if there is anything authorizing you to authorize Lewis to locate for Chisholm and Hall.
A. I was acting as agent for Chisholm and Hall.
Q. Is there anything in that power of attorney——
By the COURT: That is a conclusion for the jury.
Q. Within your knowledge, did Chisholm and Hall ever authorize Lewis to stake for them?
A. No, sir.
Q. When did you return from up that creek?

A. The night of the 6th.
Q. You went up on the 7th?
A. No, sir.
Q. When did you leave the creek?
A. On the 7th.
Q. What time?
A. Some time late in the afternoon.
Q. Had Hackley or McConaghy, at the time you left, made any location upon these claims that you put up the notices for Chisholm and Hall on?
A. No, sir.
Q. So when you left there these two claims remained with the notices upon them?
139 A. They remained as I left them.
Q. Nobody interfered at that time?
A. Not at that time. Mr. Hackley objected, and I told him the reason I didn't take them off, it was dark and I didn't get into camp until after dark.
Q. At the time you left nobody had interfered?
A. Yes, sir.
Q. You returned to Pleasent camp?
A. Yes, sir.
Q. See Chisholm and Hall?
A. Yes, sir.
Q. Did you tell them you had made a location for them?
A. No, sir; I told them I hadn't made any location for them, that Mr. Lewis was going to stake them up the creek.
Q. You swear positive that when you got back there you told Chisholm and Hall that you didn't make any location for them?
A. Yes, sir; except the preliminary notice; I told them everything I had done; I told them every identical thing I had done.
Q. Where did you tell them you had made that preliminary location?
A. Where it is there.
Q. How long have you been engaged in mining?
A. For the last two years up here. I followed it before.
Q. For how long?
A. I followed it two or three different times—short times.
Q. You have got a fair idea about these things?
A. Not on the staking question. I hadn't at that time as much as I have since.
140 Q. You had some notion before?
A. Not on the staking question, I had been mining.
Q. You mined in the British Columbia?
A. In the Northwest Territory.
Q. Who was present when you told them this?
A. Mr. Hall and Mr. Chisholm and Mr. Hawes.
Q. You heard Mr. Hall and Mr. Chisholm testify that no such a conversation as that took place?
A. Yes, sir.

Q. Mr. Hall and Mr. Chisholm stated something that was untrue?

A. Yes, sir.

Q. What did Hawes have to say?

A. He was perfectly satisfied; they all were.

Q. Mr. Hawes is a partner of yours at this time and an owner in these claims?

A. Yes; his claim was shoved up the creek the same *the* the others were.

Q. Did you put a notice up there for them?

A. Yes, sir.

Q. When?

A. On the 14th.

Q. Did you take a copy of the notice?

A. No, sir.

Q. Did you ever take a copy?

A. Yes, sir.

Q. Did you ever give it to them?

A. No, sir.

Q. Why?

141 A. Because they left Pyramid Harbor. I tried to get down, and intended to go across and notify them.

Q. Did you see them since?

A. I saw Mr. Hall about ten days after the 17th. I saw Mr. Hall on the night of the 1st or 2nd of November.

Q. At that time did you offer him a copy of the notice of location?

A. No, sir.

Q. Did you ever offer him a copy of that notice of location?

A. No, sir.

Q. On the claim that you went up there and located for them?

A. Yes, sir.

Q. Now, sir, why didn't you give them copies?

A. It was simply because they went back there and tried to hold the first two claims, and Mr. Sutherland, he said, I am thoroughly disgusted with Hall and Chisholm wanting to hold the first two claims. I think they are making a mistake. I told them I thought they were making a mistake, and we waited two or three days for them to come back, and then we took the boat down to Seattle with Mr. West and Mr. Lewis. He told them the same thing, and we expected him to go into the company.

Q. You heard Mr. Sutherland testify yesterday that conversation wasn't true?

A. Yes, sir.

Q. Mr. Sutherland lies there, of course?

A. Yes; he does.

Q. You stated, Mr. Cahoon, that you made a temporary location?

142 A. Preliminary location.

Q. Under this power of attorney?

By the COURT: He has answered that.

Q. You made that when Mr. Hackley was present and Mr. Hanson and Mr. Sutherland?

By the COURT: He has answered that; he said that they were.

Q. Now, at the time you made this location and Hackley objected did he attempt to put up any notice at that time?

A. No, sir.

Q. That was on the 5th?

A. That was on the 6th.

Q. He had been there the day before?

A. Yes, sir.

Q. And made a discovery of gold?

A. Yes, sir.

Q. No attempt was made to locate on the 5th?

A. No, sir.

Q. On the 6th?

A. No, sir.

Q. On the 7th?

A. No, sir; we were in camp.

Q. You say you instructed Mr. Lewis to chop off this notice?

A. Yes, sir.

Q. Who authorized you to have Lewis act for Chisholm and Hall?

A. No one.

Q. So you did that without being authorized?

143 A. Yes, sir; I thought I had a perfect right to.

Q. Did you make a further statement that Chisholm said he wouldn't swear to this location because Lewis had made them?

A. Yes, sir.

Q. What swearing did he have to do?

A. He said he couldn't go on the stand and swear that he had a claim, because Lewis had located them.

Q. There was no prospect of trouble?

A. No, sir; not to my knowledge.

Q. No reason for his saying that?

A. No, sir; no reason unless he had it in his mind to make trouble.

Q. You say that Hall sent you back, Mr. Cahoon, to restake these claims?

A. Yes, sir.

Q. Who was present when Hall sent you back?

A. Mr. West, Mr. Leitch, Wooden, McConaghy, Lewis, Hanson, Sutherland, Hall, and Chisholm.

Q. They all overheard what Hall said?

A. Yes, sir.

Q. What was it he said?

A. He said, You go back and stake them and I will pay you for your time and furnish your grub. I said I didn't want any pay; you can furnish me the grub.

Q. Did he tell you to take the location notices off the other claims?

A. There was nothing said. I supposed they had been taken off.

143½ Q. Did Hall know it?

A. I don't know; Mr. Hanson or Mr. Sutherland might have informed Mr. Hall they were.

Q. You don't know that Hall was so informed?

A. No, sir.

Q. Then, at the time you say this conversation took place, so far as you know, these preliminary — that you had made were on there at the time he authorized you to restake what Lewis had staked?

A. Yes, sir.

Q. While they had these two claims staked they authorized you to go up there and stake these others?

A. Yes, sir.

Q. Did you tell Chisholm and Hall while you were at Camp Pleasent who was to locate these two claims?

A. No, sir. A. No, sir; I didn't know who was to locate them. I didn't know who had staked them, except Mr. Hackley, because he objected to my staking that.

Q. You didn't tell them that?

A. No, sir.

Q. How did it happen that you came to authorize Lewis to restake for Chisholm and Hall?

A. Simply because Mr. Lewis was pretty handy with the pencil, and I had known Mr. Lewis in there that summer, and I could depend on what I told him to do; he would do it all right.

Q. He went off and staked them off; you didn't copy off these notices?

A. No, sir; for the reason that I got back late that night,

144 and I expected to go back in the creek. I didn't finish my own location. Mr. Lewis finished my own location for me. I authorized him to do it.

Q. Now, you said that Mr. Hall sent you back there. What time was it when you went back there?

A. I went back there and rewrote these notices on these claims.

Q. Did you keep a copy of them?

A. No, sir; I fetched a copy out; I didn't keep it.

Q. Did you make any other locations besides this restaking for Hall and Chisholm?

A. Why, before I got out, the day before I left there, I made a location of four powers of attorney and for myself. They have been jumped, all of them. I had no intention of doing that when I went up.

Q. Chisholm and Hall didn't jump them?

A. No, sir.

Q. You did nothing but restake for Chisholm and Hall and locate these four others under the power of attorney, did you?

A. Yes, sir.

Q. You stated that Hall sa-ctioned this change of the location?

A. Yes, sir.

Q. Did Chisholm?

A. Yes, sir.
Q. Both of them?
A. Yes, sir.
Q. At the same time?
145 A. Yes, sir.
Q. In the presence of the same witnesses?
A. Yes, sir; I think Hall, Chisholm, and Hawes and myself were there.
Q. That was all that was present?
A. I don't know whether Mr. Hanson and Mr. Sutherland were there at that time or not.
Q. You swear positive that at the time they authorized the change nobody was present?
A. This was at Pleasant camp; at Sunshine, they were all present there.
Q. At Pleasant camp, who was there?
A. At Pleasant camp there was Hall, Hawes, Chisholm, and myself. At Sunshine there was Chisholm, Hall, Sutherland, Hanson, and all of us except Mr. Hackley.
Q. They all heard it?
A. Yes, sir.

Redirect examination:

Q. Mr. Malony asked you about staking other claims; what creek was this on?
A. Cahoon creek.
Q. Not on this creek at all?
A. No, sir.
Q. Now, I will ask you—Mr. Malony talked so much about you making an explanation about having a conversation with Hackley—did you testify on the previous trial in this case?
A. Yes, sir.
146 Q. Did you testify on that previous trial you had a conversation with Hackley before you put those notices on there?
A. Yes, sir.
Q. Did I tell you to go on this witness stand and testify to that, or did you do it of your own accord?
A. Yes, sir; I did.
Q. Of your own free will and accord?
A. Yes, sir; I did.
Q. Your testimony on that point is the same as it was on the previous trial?
A. Yes, sir.
Q. Now, I will ask you if you made any discovery of gold yourself upon either the Hackley or the McConaghy claims—these claims in controversy?
A. Yes; I got some gold out of the same crevice; I discovered nothing only what he discovered.
Q. You went to the crevice where he had taken it out before or after he had shown you the gold?
A. After.

Q. Now, there was a question asked here as to when you were on the upper claims—the two claims marked as Hall and Chisholm claims.

A. On the 14th.

Q. Is that the time you went back from Sunshine camp?

A. Yes, sir.

Q. Now, there was some stress laid upon this proposition as to you not giving Hall and Chisholm a location notice; did they ever ask you for any?

A. No, sir.

147 Q. When you got back to Pyramid Harbor to meet them there, where had they gone?

A. Back up the trail.

Q. That is the trip they went up there to show Chisholm and Hall these two claims in controversy?

Counsel for the plaintiff objected to the above question as leading. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Was that the trip?

A. That was the trip.

Q. Did Hall have any conversation with you since in which he intimated that he wanted any location notices from?

A. No, sir.

Q. Now, I will ask you, Mr. Cahoon, what time it was at Pleasent camp when you went back there and what date that you notified Hall and Chisholm what you had done on that first trip.

A. On the 8th, about half past nine, I think, in the morning.

Q. And the parties were present who you testified this morning?

A. Yes, sir.

Q. Now, Mr. Malony asked you this morning if Hackley located his claim on the 7th. Where were all you people, including Sutherland, Hanson, and the other parties making up the defendant- in this case, on the 7th of October?

148 A. Mr. Hanson and Hackley and Sutherland came in about noon; they didn't get in the night before and they came in about noon on the 7th and we were in camp; it was raining all that day.

Q. Staid in camp all that day?

A. Towards night it started to clear, and Mr. Hanson started to get down as far as the lower creek, and we staid there that night.

Recross-examination:

Q. Did you stat- this morning that at that time you knew nothing of the relative value of the claims?

A. Yes, sir.

Q. You knew on the lower claims gold had been found?

A. Yes, sir.

Q. And you knew that no gold had been found on the upper claims?

A. Not at that time.

Redirect examination resumed:

Q. Did you know it afterwards?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

149 E. S. HACKLEY, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. You are the party that is claiming one of these claims in controversy and the owner?

A. I am.

Q. When did you first become acquainted with Cahoon?

A. I met him on the trail some time along in June, '98.

Q. How long have you been acquainted with Hall and Chisholm?

A. I got acquainted with them last fall. I met them, but *but* I didn't get acquainted with them until after the staking.

Q. Where did you see Hanson and Sutherland and Cahoon before going up McKinley creek?

A. Pleasent camp.

Q. Did you leave Pleasent camp some time before these parties left there?

A. Yes, sir.

Q. Who were with you?

A. I started alone.

Q. Had you anything to do with Cahoon or any of these other parties about staking claims?

A. Nothing whatever.

Q. What did you start out for?

A. To prospect.

Q. Where had you come from, as briefly as you can, at the time that you met Cahoon, Sutherland, and Hanson about the
150 mouth of McKinley creek?

A. I started out from Pleasent camp and camped over night at Boulder creek, with West and Leitch, and the next day we all went over on the Porcupine and afterwards prospected the right-hand fork, which is known as Porcupine creek, for something like two days, and there was some talk about going up the left-hand fork, but we couldn't find a way up. There was a falls at the mouth that you couldn't surmount, and we started down the creek and met Mr. Cahoon and Sutherland and Hanson. I knew Mr. Cahoon already and we stopped there where there is some benches; and there is a little gulch there to go up McKinley creek, and I started down to tell the other boys to go ahead, and I would go up McKinley creek.

Q. Indicate to the jury where it was that you met Cahoon and his party.

A. Down here below the forks; probably about in there.

Q. Where McKinley creek empties into the Porcupine?

A. Yes, sir.

Q. What conversation did you have with Cahoon and Sutherland and Hanson at that time?

A. One of the party asked if there was any camping ground at the right-hand fork, and I told them yes, and they started, and I told them that I had been up the right-hand fork, and that you had better go up the left-hand fork.

Counsel for the plaintiff objected to the witness relating the conversation that was had at this time for the reason that the same is immaterial.

151 By the COURT: Be as briefly as you can.

Q. What did you parties do?

A. We all proceeded up on top of the bank above this place.

Q. Why did you go over there?

A. It is a perpendicular bluff, and you have to find a slide to get up and down.

Q. What did you do, Hackley?

A. We tried several different slides, and finally when we did get down our party became split. Mr. Cahoon — Mr. Sutherland went down one place and I went down before Henry and Hanson, and I told them if I succeeded in getting down I would holloo back, which I did.

Q. Well, you got down and holloo- back. What then?

A. I went to prospecting and panning where I first struck the creek.

Q. What creek?

A. McKinley.

Q. Was it named then?

A. No, sir.

Q. Who named McKinley creek?

A. I did.

Q. Where was this you commenced panning in regard to these claims in controversy; which way? Mark the place.

A. On two and three McConaghy and Hackley claims. I was on No. 2, just below the line.

Q. No. 2 is the one claimed by you?

A. Yes, sir.

Q. Now, did you say anything to Cahoon or any of these
152 parties about discovering gold there?

A. Not at this time.

Q. Where was Cahoon and Sutherland?

A. They had passed me while I was prospecting and went on up the creek.

Q. Did they come back finally?

A. About this time I started on and was walking past a big rock just behind Cahoon and Sutherland, who had walked over the spot, and I struck my pick in a crevice, and the second time I got a nugget worth about two dollars, and I call- Hanson back.

Q. Was that on one of these claims in controversy?
A. Yes, sir; on the McConaghy claim.
Q. What did you say to Cahoon and Sutherland?
A. They said they didn't think the creek was any good, and I showed them about four dollars' worth of co-rse gold.
Q. That you had taken off these claims in controversy?
A. Yes, sir.
Q. I will ask you what you did then.
A. They all went back to the crevice and I went to prospecting around in the immediate vicinity.
Q. Did you have any further conversation with Cahoon and Sutherland?
A. Nothing special said that evening.
Q. That is the evening of what day?
A. The 5th.
Q. About what time?
A. It was approaching evening.

153 Q. What did you boys, including Sutherlang and Hanson, do the balance of that evening?
A. We prospected there a little while, and sent Henry down to tell the other boys to come up immediately, and gave him the gold to exhibit to them.
Q. Then where did you boys stay that night—that is, including Cahoon and his party and yourself?
A. We went back to where we left our blankets on the bench.
Q. Did you stay there that night?
A. Yes, sir.
Q. What did you do the next day?
A. We went down in the creek again.
Q. State briefly now what you did that day.
A. I went to prospecting right straight off.
Q. Where?
A. I prospected some on No. 2 and then went on No. 3.
Q. Are those the McConaghy and Hackley claim marked on the map?
A. Yes, sir.
Q. Where did the other boys go?
A. They scattered around. I don't know where they went.
Q. What else took place?
A. After we prospected around a while we go to this old crevice again, and I was prospecting in it and Mr. Cahoon said, I have a power of attorney for the boys at Pleasent camp, and says, What is the matter with putting up the name of the boys on the post? and I says, I claim this ground; I discovered the gold; this is the claim I expect to take. Well, he says, I would like to put the names on; in case anybody else comes along they would have it in case

154 you change your mind, and I told him not to put them there.
Q. Did you ever consent in any manner or form for him to put those notices up there?
A. I never did.

Q. After you found out he put them up there, when was the next you had a conversation about them?

A. As soon as I found it out I told him he had to take them off.

Q. You have at all times claimed those claims?

Counsel for the plaintiff objected to the above question, for the reason that the same is leading.

By the COURT: It is a question for the jury.

Q. Have you located any other claims upon McKinley creek?

A. No, sir.

Q. Or made any claim to any other claim on McKinley creek?

A. I never did.

Q. I will ask you if you signed that notice.

A. No, sir; I did not. I signed an exact copy of that, but for some unaccountable reason Mr. Mix, who recorded my claim, made out a different one. That was done about the same way that Mr. Hall and Mr. Chisholm testified their claims was fixed. That is an exact copy of my notice on the tree at that time.

Q. That is the one that has been recorded, is it?

A. Yes, sir.

Q. Did you ever stake it or put any stakes on the ground described in that location notice?

155 A. Yes, sir.

Q. State what day it was.

A. On the 8th of October, '98.

Q. What time of the day and when was it that you put up any stakes on the piece of grounds that is described here? Just describe to the jury what your stake was and what you put upon it.

A. I staked between 11 and 12 o'clock on the 8th of October, '98, and that is an exact copy of the notice on the stake, according to the rule I have always followed out, at each end of my claim.

Q. And put a notice of the same kind on each stake?

A. Yes, sir.

Q. Now, can you take this map, Mr. Hackley, and indicate about where in regard to what is marked here as the McConaghy and Hackley claims—state to the jury where you put these stakes.

A. One stake at the lower end—that would be at the McConaghy claim—and the other stake is about where this line is. (The witness indicated the first stake was on the dividing line between claims Nos. 2 and 3 and the other stake on the dividing line between claims Nos. 1 and 2.)

Q. That is the claim that is claimed by whom in this case?

A. Mr. Chisholm.

Q. That is in controversy?

A. Yes, sir.

Counsel for the plaintiff offered in evidence the location
156 notice that has just been identified by the witness. Counsel for the plaintiff objected to the introduction of the location notice in evidence for the reason that the same is not sufficiently definate and certain under the laws of the United States to identify

the claim and not being marked by any permanent object or monument sufficient for identification, and that the location notice, as testified by the witness, is not made by a person that took a copy from the original notice, nor is it testified that the recorder has a copy of the original notice.

Q. This is an exact copy of what you posted on the monument?
A. Yes, sir; I gave Mr. Mix an exact copy; I took it myself.
Q. You had seen the other one yourself?
A. I had, and my witness had also seen it.

By the COURT: The only serious objection is the absence of any reference *of any reference* to any permanent monument; it don't seem to be tied to any location or permanent monument of any kind.

By Judge WINN: There is no controversy but what they both claim the same claim.

By the COURT: That is true, but you have to have a loca-
157 tion notice. I think I will admit it.

The location notice, having been admitted in evidence by the court, was marked Defendant's Exhibit No. 1 and read to the jury as follows:

"*Notice of Location.*"

"Notice is hereby given that I locate and claim under the United States mining laws one mining claim on creek known as McKinley creek 1,500 ft. from this notice up creek and 300 feet on each side of center of creek bed, in the Porcupine mining district, district of Alaska.

"Oct. 8th, 1898.

"E. HACKLEY, *Locator.*

Witnesses:
C. G. LEWIS.
ALEX. McCONAGHY."

(Endorsed:) "E. Hackley. Location, McKinley. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded in Book 6, Placers, on page 100, of the records of said district. Norman E. Malcolm, district recorder."

Q. How far was this notice posted from the place where Cahoon had written on that snag?
A. I should judge 150 feet below.
Q. The stake that you had there as described by Hall and Chisholm is the same stake they describe as being there?
A. I presume it must be.
Q. Have you ever put up any other notice except that one?
A. No, sir; this is the only notice.

Q. Did you at any other time after this conversation with
158 Cahoon going up the creek, that you remonstrated with him, did you have any further conversation in which you asked him to take down that notice he put up there?

Counsel for the plaintiff objected to the above question for the reason that the same is leading.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Did you ever have any other conversation with Cahoon about this notice on the stump there?

A. Yes, sir.

Q. State what it was.

A. The day of the 6th he promised to do so, and we got separated, and that evening I and Mr. Sutherland and Mr. Hand laid out, and didn't see anything more of Cahoon until the next day, and the first words I said to him, Why didn't you remove this notice? and he said, I forgot it; he said, I forgot all about it; that is the reason; and I told him that this notice was still on there, and I had always understood that a miner was allowed time to prospect his ground.

Q. What did Cahoon do after you spoke about this?

A. He authorized me to take it off, and I told him I wouldn't do it.

Q. Did he have any conversation with Lewis about this?

A. After I refused he turned to Lewis and said, I authorize you to remove these—that is, Lewis to take them off and stake this ground somewhere else.

159 Counsel for the plaintiff objected to the above answer and ask that the same be stricken out for the reason that the evidence shows that Mr. Cahoon didn't have any authority to authorize Lewis.

Objection is overruled by the court.

Q. Now, then, Hackley, what became of Cahoon after that time?

A. He left for Camp Pleasant.

Q. That was on what date?

A. On the 7th.

Q. You stated a while ago that on the 8th you staked this claim?

A. Yes, sir.

Q. When did you next see Cahoon, Chisholm, Hall, Hanson, and Sutherland?

A. I met Mr. Cahoon and Mr. Hanson on the 10th, I think it was, but I wouldn't be certain. They came over from Boulder creek and was going up Porcupine and met us.

Q. Where are you from?

A. California.

Q. You are a citizen of the United States?

A. A native son of California.

Q. Were you present in Camp Sunshine?

A. No, sir.

Cross-examination by Mr. MALONY:

Q. What date was it you met Cahoon, Hanson, and Sutherland when you were on your way down?

160 A. On the 5th.

Q. What time in the day?
A. I don't know; I think about noon.
Q. What, if anything, did you do that day?
A. We went up and around to get on McKinley creek, above the falls.
Q. You went up McKinley creek that day?
A. Yes, sir.
Q. Did you make any discovery of gold that day?
A. I did.
Q. Did anybody else?
A. No; I don't think there was.
Q. Who was with you?
A. Hanson went right past me.
Q. Was Sutherland and Cahoon together?
A. They were a short distance further up.
Q. Did Sutherland make any discovery?
A. He never claimed to.
Q. Answer the question.
A. Not that I know of.
Q. Did you hear Cahoon testify that he made a discovery?
A. No, sir.
Q. If he did testify that Sutherland made a discovery, he tells what is not true.
A. I never heard of his making a discovery.
Q. I asked you the question if Mr. Cahoon stated that it is not true.
A. Undoubtedly.
Q. Was Sutherland in the creek ahead of you or after you?
161 A. I presume he was in ahead of me.
Q. He and Cahoon both?
A. I presume so. I don't know.
Q. You didn't see them go in there ahead of you?
A. No, sir.
Q. What were they doing?
A. They were tramping along.
Q. You don't know whether they did any prospecting or not?
A. I don't know.
Q. You don't know of your own knowledge whether Sutherland found anything or not?
A. I know he didn't.
Q. You wouldn't swear positive?
A. Yes, sir; I would swear to it.
Q. You swear positive you were the first to discover gold?
A. Yes, sir; certainly.
Q. That was on the 5th?
A. Yes, sir.
Q. When you made a discovery did you make a location?
A. No, sir.
Q. Where did you go after you made the doscovery of gold?
A. Went back to camp.

Q. Point out to the jury where it was that you made the discovery of gold that day.

A. It was down somewhere along in here. (The witness indicated below the dividing line between claims Nos. 2 and 3.)

Q. That was on the 5th?

A. Yes, sir.

Q. Where did you go that day—any further up the creek?

162 A. A short distance up the creek to the next falls.

Q. How far up?

A. I should judge a quarter of a mile.

Q. On the 5th, you discovered gold on the 5th and you made no location on that day?

A. No, sir.

Q. Did you make any location on the 6th?

A. No, sir.

Q. Where did you go on the 6th?

A. Went up McKinley creek, up here around the falls quite a ways above the mouth of Cahoon creek.

Q. How far up McKinley creek did you go on the 6th?

A. Probably a mile or such a matter above the Hackley location.

Q. Did you prospect along there, all of you?

A. Yes, sir.

Q. Did you go up as far as 11 and 12?

A. No, sir.

Q. Point out to the jury how far you went up on the 6th.

A. I think we went up to about No. 8.

Q. On what date?

A. On the 6th.

Q. Where did you stay the evening of the 6th?

A. I and Mr. Sutherland and Mr. Hanson slept out on Cahoon gulch.

Q. Where did you go on the 7th?

A. Started back to camp.

Q. Did you go any further up than No. 8?

A. I think not.

Q. Would you swear you didn't?

163 A. I will swear that I didn't go much further than that.

Q. How much further?

A. Not over a quarter of a mile further anyway.

Q. A quarter of a what?

A. A mile.

Q. About as far as the end of No. 9?

A. Somewhere along in there; I couldn't say exactly.

Q. You wouldn't swear that you didn't go as far as 11 and 12?

A. No; I would swear I didn't.

Q. You would swear you did?

A. No, sir.

Q. When you got in this neighborhood did you find any gold anywhere?

A. We got a good prospect.

Q. You didn't find as good a prospect as you found on these claims—these Hackley and McConaghy claims?
A. Just as good as on the Hackley.
Q. Did you say you found four dollars on the Hackley?
A. I never said I found four dollars on the Hackley claim.
Q. Where did you testify you found four dollars?
A. On the McConaghy claim.
Q. Up there did you find anything as good as that?
A. No, sir; we never prospected bed rock.
Q. You didn't make any location on the 7th here at all?
A. No, sir.
Q. When you got back did you make any location on the 7th on the Hackley or McConaghy claim?
A. No, sir; I did not.
164 Q. You knew that on the 6th that Cahoon had put up a notice for Hall and Chisholm on these claims?
A. Yes, sir.
Q. You say you remonstrated at that time?
A. I did.
Q. Did you put up one of your own?
A. No, sir; I did not.
Q. In the meantime you had gone off the claim?
A. Yes, sir.
Q. Gone up the creek?
A. Yes, sir.
Q. And on the 8th day of October you located?
A. Yes, sir.
Q. You knew that Cahoon had put a notice up in the meantime?
A. Yes, sir.
Q. Where was McConaghy at this time?
A. On the 5th he was down at the mouth of the Porcupine, I think; I don't know.
Q. Where was he on the 8th?
A. On the 8th he was in McKinley creek.
Q. With you and located at the same time?
A. Yes, sir.
Q. You located one claim and he the other?
A. Yes, sir.
Q. Were you present on the 6th day of October when Cahoon put up the notice there?
A. In the immediate vicinity?
Q. Right close when he made the location notice?
A. No, sir.
165 Q. Who else was in the immediate vicinity?
A. Mr. Sutherland and Mr. Hanson.
Q. Do you know what time it was when he put up the location notice?
A. I think in the forenoon.
Q. What makes you think so?
A. Because we hadn't eaten our lunch until shortly afterwards.
Q. When was it you objected to it?

A. As soon as he spoke about the power of attorney.

Q. Didn't he put up the notice of location before he spoke about the power of attorney?

A. No, sir.

Q. Did you hear Cahoon testify this morning that the first you objected was when you was going up the creek?

A. Yes, sir; I heard it.

Q. That is not true?

A. No, sir.

Q. After your location on the 8th, Mr. Hackley, at that time were you acquainted with Hall and Chisholm?

A. I knew them by sight.

Q. Were you acquainted with him?

A. No, sir; I wasn't.

Q. So at the time you made this location notice you had no personal acquaintance with them?

A. No, sir.

Q. When did you first meet them personally?

A. I had seen them in June, I think, on the trail, but I didn't get acquainted with them.

166 Q. When did you first meet them in a friendly way?

A. I think at Camp Walker was the first time.

Q. Did you ever hear any conversation between them and Cahoon?

A. No, sir; I was present.

Q. You say you was the party that named McKinley creek?

A. Yes, sir.

Q. Who was present when you went into the creek?

A. Mr. Sutherland, Hanson, and Cahoon.

Q. Sutherland and Cahoon were first in?

A. I presume probably they were.

Q. You take the honor of naming that creek?

A. Yes, sir; I remember I also named the Cahoon gulch, and I named Bryan creek. I will tell you why I named them McKinley creek and Bryan creek; it was because one had gold on and the other didn't.

Q. About this location notice, what did you put that location notice on?

A. Both notices were on a tree at each end.

Q. Where was the tree you put the first notice on? Did you write the notice on the tree?

A. Mr. Lewis wrote the notices and I signed my name.

Q. Did you take a copy of the notice yourself?

A. Yes, sir.

Q. What did you take it on?

A. On a piece of paper.

Q. Did you take the copy down to Mix?

A. I did.

Q. How do you come to swear this is an exact copy?

167 A. My memory is very good. I would trust my memory at any time on my oath.

Q. Repeat what was on that notice.
A. I refuse.
Q. Why so, if you have got such a remarkable memory? Your memory might be defective on some other things.
A. When I first saw that notice I remembered it—that is, the notice.

Redirect examination:

Q. You recorded this and made this notice out within what length of time after this notice was put up there on the tree?
A. Within thirty days; a good deal less.
Q. Your memory was better then?
A. Yes, sir.
Q. Mr. Hackley, I forgot to ask you a couple of questions. Did you hear Sutherland testify here yesterday; did you?
A. Yes, sir.
Q. Did you hear him testify that when you were up the creek there, somewhere above those two claims in controversy, that you told him that you would go down the creek and stake out a claim below these claims?
A. Yes, sir.
Q. Did you make any such statement as that?
A. No, sir.
Q. I will ask you, Hackley, if you remember hearing Hall testify on the stand in the trial of this case at Skaguay.
168 A. Yes, sir.
Q. Did you hear his testimony on the subject as to what he and the parties who was with him left Sunshine camp and went down to Pyramid Harbor for?
A. Yes, sir.
Q. Did he testify upon that trial that they went down for the purpose——
A. Of forming a company.
Q. Did he testify one syllable or word that he left Sunshine camp to go to Pyramid Harbor or Chilkat for the purpose of making location notices?
A. He said they came down to draw up the papers of the company.
Q. Did you hear him testify upon the proposition as to whether or not he knew what Cahoon and Lewis left Sunshine for and went back up the creek?
A. He testified he didn't know what they went back for.
Q. That is what he testified on the previous trial?
A. Yes, sir.

169 C. G. LEWIS, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. Mr. Lewis, you are the same party that draw this map and plat, are you?

A. Yes, sir.

Q. On this side which is marked "X" I will ask you if the characters drawn there and the locations made of the particular mining claims, including the two in controversy, and also the two upper claims which we claim belong to Chisholm and Hall, are represented fairly, as well as you could draw them without measurements and a survey, the manner in which these claims are located.

A. It is.

Q. And the creeks along there?

A. Yes, sir.

Q. Now, on the other side of the map which is marked "W," I will ask you if you drew that also.

A. I did.

Q. I will ask you if the streams are located in the manner in which they flow—the directions and so forth—and if this is about as these matters are upon the ground.

A. Yes, sir; they are.

Q. Mr. Lewis, how long have you been acquainted with Chisholm and Hall?

A. I met Mr. Hall something over eighteen months ago.

170 On the steamer Alice Blanchard, we were both passengers on that boat, and Mr. Chisholm I saw last fall at Pleasent camp.

Q. Then you came up on the steamer from Seattle with Hall, and did you see Cahoon also aboard?

A. Yes, sir.

Q. How long have you known Cahoon and Hawes?

A. Well, I met him on board and I saw him on the trail, but not to know him until last fall.

Q. You was aboard with these parties, both Hall, Cahoon, and Hawes, the three on the steamer?

A. Yes, sir.

Q You had no acquaintance with any of them before that *that* time?

A. Mr. Hall came from s-uthern California. We both came here from San Pedro.

Q. When did you get acquainted with the rest of the party?

A. Mr. Leitch came on board at the same time Mr. Hall and I did. Mr. West was on the same boat. Mr. Hanson I met going in on the trail. Mr. Sutherland I met last fall. Mr. Hackley I met going in on the trail. Mr. Wooden and Mr. McConaghy I met in the fall. I had seen them in the spring, but not to know them.

Q. Now, you heard the testimony of Hackley about he was conducting you and the other parties some time in the month of Octo-

ber, '98, up in the Porcupine mining district. Where was that, Mr. Lewis?

A. Well, it was on Boulder creek. It isn't directly in that district now, but it is right across from the mouth of Porcupine;

171 a little above. We stopped there for the night and Mr. Hackley came over there and got into the camp some time that day.

Q. Where did you go from there?

A. From there we went to Porcupine creek and up Porcupine creek.

Q. Were you out prospecting at the time you ran across Hackley?

A. We were on our way to prospect the creek.

Q. Where did you meet Cahoon and his party, being Hanson, Sutherland, and Cahoon, after they left Camp Pleasent?

A. We met them on Porcupine creek, a little ways above the falls; the falls are below the junction, probably 12 or *or* 15 hundred feet below the junction.

Q. Where the McKinley creek runs into the Porcupine?

A. The falls are almost at the mouth of the creek.

Q. What did you parties do then?

A. Mr. Wooden, Mr. McConaghy, Mr. Leitch, Mr. West, and myself met them and they went on, and we went on down the creek to the mouth and went into camp there, and Mr. Hackley and Mr. Henry were behind Wooden and us, and I didn't see them until that evening, when Mr. Henry came down and showed us some gold and told us they wanted us to go back up the creek.

Q. When you parties met Cahoon, Hanson, and Sutherland you continued going on down, and they went up McKinley creek?

A. Hackley was behind us, he and Mr. Henry; we were ahead of them.

Q. When you heard that this gold had been discovered up

172 the creek, what did you do then?

A. We sent two boys back to Pleasent camp for more provisions, and the balance—that is, Mr. West, Mr. McConaghy, and myself—went up to McKinley creek.

Q. Which two did you send to Pleasent camp?

A. Mr. Leitch and Mr. Wooden.

Q. What time did you meet Cahoon, Hackley, Hanson, and Sutherland up McKinley creek?

A. Mr. Cahoon got into camp the night of the 5th or, I think, it was the night of the 6th; I am not certain about that. I know we had got into the creek—it was the night of the 6th, because we had got up on the 6th and went down into the creek, and Mr. Cahoon got into camp late.

Q. When did you see Hackley and Sutherland and *Hackley?*

A. The next day.

Q. On the 7th?

A. Yes, sir.

Q. Now, did anything else take place on the 7th?

A. Why, these boys brought in prospects and showed them to us. We had a conversation there in regard to staking the creek, and Mr.

Cahoon said in order to work the creek it would have to be worked on a large scale; one man alone couldn't work it.

Q. State as to whether or not that you had any conversation with Cahoon there at that time about going up the creek and doing any staking.

A. I did; yes, sir. Mr. Hackley got into camp that noon, I think, it was just about noon, and he asked Mr. Cahoon why he hadn't
173 taken the stakes for Hall, and Cahoon told him that it was late and he hadn't had time for it, and he said, I will authorize you to take them off, and Mr. Hackley said, I will do no such a thing, you will have to take them off yourself, and Cahoon said he had to go back to Pleasent camp and he would appoint me to take them off for him.

Q. What was the purpose of Cahoon going back to Pleasent camp; do you know?

A. Yes, sir; I do.

Q. What did he go back for?

A. To have the boys meet us and all parties go down to Chilkat at that same time.

Q. Before you left there you started to tell that he gave you some others about staking; what was that?

A. He told me to remove those stakes.

Q. Had there been any stake set?

A. One stake set.

Q. What do you mean?

A. There was a snag in the creek and some writing on it.

Q. Did he set it or was the snag there?

A. Yes, sir; it was there.

Q. These notices that have been referred to as being on that snag?

A. Yes, sir.

Q. State the conversation.

A. He told us to put the three claims of the power of attorneys that he had——

Q. What three?

A. Mr. Hawes, Mr. Chisholm, and Mr. Hall, and place them
174 on the upper end of the bunch of claims that we were locating.

Q. What did you do?

A. On the next day, on the 8th, we went up, as he told us to do, and the rest of the boys staked the same day.

Q. Now, the clat you indicated that he told you to stake, state what claims they are.

A. Nos. 10, 11, and 12.

Q. Marked what?

A. Chisholm, Hall, and Hawes.

Q. How did you locate these claims?

A. Why, the lower side, the Hawes claim, was put on a large tree right at the timber line, and the upper stake we made a monument of stone, and a monument of stone at each end of the other two claims, and put notices on top of these.

Q. What kind of notices?
A. The ordinary location notices; wrote it on a flat stone.
Q. Did you write this?
A. Yes, sir; I did.
Q. Do you remember the substance of them?
A. Yes, sir.
Q. State what you wrote on them.
A. I, the undersigned, claim 1,500 feet up this creek for mining purposes, and 300 feet on each side; dated them and signed the name to them, and I put my name as agent.
Q. Did you have them witness?
A. Yes, sir.
Q. You located the Hawes, Chisholm, and Hall claim in this?
175 A. Yes, sir; I did.
Q. Now, were there any other claims staked out that day?
A. Mr. Leitch staked a claim and Mr. Wooden staked a claim.
Q. Have you marked them on your map?
A. Yes, sir.
Q. You haven't put the names on them?
A. No, sir.
Q. Mark the names on there as staked at that time.
A. (The witness complied with the request of counsel.)
Q. Have you a claim also there, Mr. Lewis?
A. I have; yes, sir.
Q. *Mahe* you marked it?
A. Yes, sir.
Q. Where is it?
A. It is nearly at the mouth of McKinley and Porcupine.
Q. Below the McConaghy and Hackley claims?
A. Yes, sir.
Q. After that, Mr. Lewis, after you did that staking up there, when did you meet Cahoon, Chisholm, Hall, Hanson, and Sutherland again?
A. I met Mr. Cahoon and Mr. Hanson on McKinley creek, right below the falls. I think it was the morning of the 9th or about noon of the 10th I met the rest of the boys, Mr. Cahoon and Hanson being in company with us. We met them at Camp Sunshine.
Q. At Camp Sunshine. Were you there at the meeting when all of the plaintiffs were there except Dalton and all the defendants except Hackley—were you?
A. Yes, sir; I was.
176 Q. Now, what took place there and what conversations were had, Mr. Lewis, in the presence of all the plaintiffs except Dalton and all the defendants except Hackley?
A. We met Mr. Cahoon coming down the trail and he told us——
Q. Don't state it unless the others were present.
A. I couldn't say whether they were or not. We had a meeting at which all were present except Hackley and Mr. Dalton. Mr. Hall stated that they were not certain that they had claims, for the

reason that I staked them and not Mr. Cahoon, and Mr. Chisholm also had the same opinion, and Mr. Cahoon said that he would go back and stake them over, and Mr. Hall said, If you will I will pay you for it and furnish you the provisions, and Mr. Cahoon told him he didn't want any pay for it; that he started out to do it and he would finish the work, and I volunteered to go back with Mr. Cahoon. Mr. Hall told us that we could take provisions out of Buckman's camp.

Q. What claims was he going back to restake?

A. The claims I had staked.

Q. What claims? Mention them on the map.

A. Nos. 10, 11, and 12.

Q. Either one of the claims in controversy?

A. No, sir; there was nothing said about these claims at all.

Q. Go ahead and give the rest of the conversation.

A. We got our provisions and Mr. Hanson gave me his pack and blankets and we started back, and we went back up McKinley creek that night and we spent two days in going up to the upper claims and finished out staking.

Q. About how far is it from Sunshine camp up to where
177 you staked the upper claims?

A. I should judge fourteen or fifteen miles.

Q. Was there a road?

A. No road except the river bottom. We traveled on one side and then on the other side and wherever we could.

Q. Did you hear Hall and Chisholm, either one of them, make any objection during the entire stay there except the ones you have just mentioned?

A. No, sir.

Q. Did they say anything at all during the entire stay in your presence about these two claims in controversy?

A. There was nothing mentioned about them that I heard. I was there all the time.

Q. How long did that meeting that you had there last, about how long?

A. I should judge ten or fifteen minutes.

Q. Quite a little talking going on all the time?

A. There was; yes, sir.

Q. Did you have any conversation with either one of the plaintiffs in this case as to what they were going to Pyramid Harbor for?

A. They told us they would meet us there, and we would draw up the paper and make a company, form a company.

Q. Did you hear the testimony of Mr. Hall on the stand?

A. I did.

Q. Also Mr. Chisholm's?

A. Yes, sir.

Q. And Hanson's?

178 A. Yes, sir.

Q. Was there anything at all said at the camp at that time about going down to Pyramid Harbor or Chilkat for the purpose of making out location notices and having them recorded at Juneau?

A. No, sir.

Q. You also heard these witness- who I have last mentioned testify upon the other trial?

A. I did; yes, sir.

Q. Did either one of these witnesses testify anything at all about going down to Pyramid Harbor or Chilkat from Sunshine camp to meet you boys for the purpose of making out notices and having them recorded upon that trial?

A. They did not.

Q. Now, when you and Cahoon got up the creek there, state briefly to the jury what Cahoon did in regard to making monuments or notices upon these two upper claims here, called on this map the Hall and Chisholm claims.

A. The monuments were still there. We simply wrote the notices over.

Q. Have you see- them there since that time?

A. Yes, sir; they have been there all summer.

Q. All this summer?

A. Yes, sir; at least they were up to July and August. I haven't been up since then.

Q. Up to this time that Cahoon went up there were there any other stakes set there or any one else taken up that claim or either one of these claims?

179 A. They had not.

Q. Up to the 14th nobody else laid any claim to either one of them?

A. No, sir.

Q. You also heard the testimony of Hall upon the witness stand yesterday in which he stated that Cahoon and you left Sunshine camp to go up McKinley creek to do this staking, which you have just spoken *up* that Hall testified yesterday you were going up to rectify some staking.

A. We simply put Mr. Cahoon's power of attorney on the stake that I put there on Nos. 11 and 12.

Q. You mean to sign as an attorney?

A. Sign them, as he was their attorney.

Q. You didn't mean that he was going up there to post the power of attorney on the claims?

A. No, sir.

Q. Did you hear Hall's testimony on the trial at Skaguay as to whether or not he knew for what purpose you and Cahoon were going up for?

A. I did.

Q. What did he testify upon that trial?

A. He said he didn't know.

Q. You were with Hackley and McConaghy at the time they staked their claims?

A. I am not certain whether I was or not; I think I was.

Q. You don't remember that particularly?

A. No, sir.

Q. Now, did you go down to Pyramid Harbor finally after leaving Sunshine camp?

180 A. We did.

Q. Who did you find there?

A. We found Mr. Hackley, Mr. Leitch, Mr. West, Mr. Wooden, and Mr. McConaghy, not at Pyramid Harbor, at Chilkat.

Q. Was there either Chisholm or Hall or Hanson or Sutherland or Dalton there at that time?

A. No, sir.

Q. Was Hawes there?

A. No, sir; Mr. Hawes had gone.

Q. Where had he gone?

A. Went across to the harbor that afternoon.

Q. Where did you see Hall or Chisholm after that time?

A. I saw Mr. Sutherland coming down on the Faralon last fall, and I saw Mr. Hall on board of the Walla Walla from Seattle to San Francisco.

Q. Did you have any conversation?

A. I did with Mr. Sutherland.

Q. What was that?

A. Mr. Sutherland told me that they had gone back and changed the stakes and were going to try to hold the lower claims, and that he was disgusted with the way they had acted, and that he would join the company in the spring.

Q. Your company?

A. Yes, sir.

Q. Did you have any conversation with Hall or Chisholm?

A. I didn't; I seen them this summer, but I didn't have any conversation with them.

Q. Mr. Lewis, I wish you would state briefly the improvements, and so forth, that has been made upon these Hackley and

181 *and* McConaghy claims which we have so termed on the map, being the two in controversy.

A. We have whip*ped* sawed between four and five thousand feet of lumber; four boys worked two weeks putting in a tail race on the Hackley claim; we put in two or three prospect holes; put in a flume 110 feet long, but it was broken.

Q. About altogether, Mr. Louis, how much work and labor and material have you boys expended upon these two claims in controversy since they were located by McConaghy and Hackley in October, '98?

A. Three or four thousand dollars' worth, I should say.

Cross-examination by Mr. MALONY:

Q. Mr. Lewis, have you done most of that work since June 16th, '98?

A. No; we have not.

Q. When did you do it?

A. Most of the whipsawing before the snow left.

Q. How much have you done since June the 15th?

A. Put in the flume.
Q. That was the total amount expended there?
A. No; it wasn't.
Q. What was the other work?
A. We put in a trail and other work.
Q. You mean to say you built the trail up there?
A. Yes, sir; all along this creek.
Q. That present trail up there now?
A. Yes, sir.
182 Q. You mean to say you boys built that, do you?
A. We did.
Q. What work did you do since June 16th, '99?
A. We put in that flume and prospect-work; some holes in on the side of the creek.
Q. You did that work there knowing that these other boys were in possession of the claim?
A. They were there in possession the same as we were; we were working on the claim; so were they.
Q. You claim you are in possession, do you?
A. Yes; certainly.
Q. You went up and located several claims for Chisholm and Hall?
A. Located one for each.
Q. What date was that?
A. On the 8th of October, '98.
Q. Were you acquainted with Chisholm at that time?
A. I was—that is, I had met him at Camp Pleasant.
Q. Prior to that time?
A. Yes, sir.
Q. Had any conversation about locating any claims?
A. No, sir.
Q. Acquainted with Hall?
A. Yes, sir.
Q. Where had you met bim?
A. Along on the trail all summer.
Q. Did you have any authority whatever to locate for him?
A. Nothing except what Mr. Cahoon gave me.
Q. So when you located you had no authority whatever?
A. Only what Mr. Cahoon gave me.
183 Q. You had had no conversation about it?
A. No, sir; I had not.
Q. Did you see any power of attorney for Mr. Chisholm and Hall and Hawes?
A. I did.
Q. Look and see if this is the one you saw.
A. I think it is; I am not positive of it.
Q. You think it is the one?
A. Yes, sir.
Q. You are from California?
A. I am.
Q. You are a college-bread man?

A. No, sir.
Q. A high-school education?
A. I have.
Q. Do you see anything in there to authorize you to locate for Chisholm and Hall?

Counsel for the defendant objected to the above question for the reason that the paper speaks for itself and is the best evidence.
Objection sustained by the court.

Q. Notwithstanding without any authority from Chisholm and Hall, you located those claims?
A. I did.
Q. Did Hall ever tell you afterwards that he ratified your action?
A. No, sir.
Q. Did Chisholm?
A. No, sir.
184 Q. Did either one ever attempt to ratify your action in any manner?
A. I couldn't say that they did in any conversation.
Q. When you put up that notice you signed it as his agent?
A. I did.
Q. You knew you wasn't his agent?
A. No; I didn't; I suppose- Mr. Cahoon had power to bind him.
Q. You read the power of attorney?
A. Yes, sir.
Q. Have a high-school education?
A. Yes, sir.
Q. And you supposed you was his agent?
A. I did.
Q. You did the same thing for Mr. Hall?
A. I did.
Q. How many people are in your company?
A. Eight now.
Q. And you have got eight claims, have you?
A. Yes, sir; we have with these two in controversy.
Q. You don't know of any other claims that Chisholm and Hall claim except these two?
A. Why, I haven't seen any stakes; I heard of some.
Q. You know as a matter of fact they don't claim any except these two located for them?
A. I don't know. I heard they located some bench claims directly back; I don't know whether it is so or not.
Q. You were not present on the 6th when Mr. Cahoon put up the notice on these claims?
185 A. No, sir.
Q. You didn't hear any conversation that took place at that time?
A. No, sir.
Q. You first went up there on the 7th?
A. Up into McKinley creek?
Q. Yes, sir.

A. No, sir; on the 6th.
Q. When did you do any staking of your own?
A. Staked on the 8th.
Q. Who went with you when you staked?
A. Mr. Hackley and Mr. McConaghy, I think.
Q. Mr. McConaghy staked one of these claims in controversy?
A. Yes, sir.
Q. The first time you know of his being on that ground was on the 8th?
A. No, sir; on the 6th.
Q. He made no location?
A. No, sir; simply prospected around there.
Q. At this conversation down at Camp Sunshine, when Hall told Mr. Cahoon to go back up there, who was present?
A. All the parties of both companies with the exception of Dalton and Hackley.
Q. Mr. Hall talking for himself? Mr. Chisholm was there?
A. Yes, sir.
Q. Did he coincide in it?
A. Yes, sir.
Q. Was that the only thing you went back for?
A. Yes, sir.
Q. Did you and Cahoon stake any other claims?
186 A. I didn't.
Q. Cahoon did?
A. Yes; he did. I didn't go with him. I believe he had some power- of attorneys and staked them on Cahoon creek, and I waited until he came back.
Q. He staked five claims?
A. He put up one stake for five claims.
Q. That was the way he was staking?
A. That was the only way he had to stake them.
Q. How do you know?
A. I saw the stake.
Q. When did you see it?
A. This spring.
Q. You don't know whether he put any others there or not?
A. I know he didn't at that time.
Q. Did he since?
A. Possibly.
Q. When you went back what did Cahoon do?
A. He simply rewrote the notices.
Q. You alread- had the notices there?
A. Yes, sir.
Q. What did Cahoon do with them?
A. I don't know. I suppose he rubbed them off. I think he wrote on the other side of the rock on one claim; the other one I am not positive about.
Q. Your memory is defective about that?
A. No, sir; it isn't; I haven't thought of it for about a year.

(By the COURT:)

Q. Dis you remove that notice that Mr. Cahoon told you to?

187 A. No, sir; when we came down the creek we kept on the benches, and it was out of our way to go into the creek.

Q. I want to read to you a part of an answer that was filed on the 16th day of June in which a man by the name of McConaghy—he is one of your partners?

A. Yes, sir.

Q. "That the said Chisholm and Hall * * * still unlawfully and forcibly and against the will and consent of the said defendant maintain possession of the said claims to the exclusion of the said defendant, and prevents the said defendant, The McKinley Creek Mining Company, from working and operating the said claim." If McConaghy has sworn to this answer and the facts are true, while Hall and Chisholm were in possession how could you do this work that you say you did after the 16th of June?

Counsel for the defendant objected to the above question for the reason that the same is calling for a conclusion of law; that it don't matter whether a party enters upon a foot or the whole of your claims. If he takes a foot of it, it constitutes an ouster. This is a pleading that I drew myself, and I drew it under the authorities. If a party is working upon a mining claim, it is an ouster if he crosses your boundary line.

(By the COURT:)

Q. Do you recollect whether or not you ever knew the contents of that?

188 A. I heard it read.

(By the COURT:)

Q. You knew the contents of it?

A. Yes, sir.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Is it not a fact that much of this improvement that was put on there was put on after the 16th day of June, '98?

A. We have been working on there all summer.

Q. Is it not a fact that you put on there, known as the Hall and Chisholm claims, the improvements, knowing that Hall and Chisholm were in possession of the claim?

A. No; they were working on there the same as we were.

Q. Then if Mr. McConaghy on the 21st day of June swore that they were in possession, that is not true?

Counsel for the defendant objected to the above question for the reason that the same is calling for a conclusion of the witness.

Objection sustained by the court on the ground that it is immaterial.

Redirect examination:

Q. I will ask you, Did you hear Mr. Sutherland testify on the trial of this case before, at Skaguay?

189 A. Yes, sir.

Q. Did you hear him testify day before yesterday?

A. Yes, sir.

Q. What was his testimony in regard as to who made the first discovery of gold on the Hackley and McConaghy claim at Skaguay?

A. He said he didn't know, but he supposed Hackley was.

Q. Then you heard his testimony here yesterday that he was the first discoveror of gold?

A. Yes, sir.

Q. Mr. Malony asked you as to whether or not you had any authority from Hall or Chisholm to stake out claims for them. From whom did you take your orders to stake these claims?

A. Mr. Cahoon, their agent.

Q. And it was upon that authority alone, was it, that you did it?

A. It was.

Q. He asked you whether or not Hall or Chisholm ever ratified your action, and I think you answered, No; but when they were in camp the only objection raised was the objection that you didn't have authority?

A. That was the only objection.

Q. Did they ratify the action of Mr. Cahoon when he went back to restake them or say that would be all right?

A. Yes, sir; they did.

Q. Now, Mr. Malony asked you if these claims—whether or not Chisholm and Hall have any claims other than the ones in controversy. I will ask you whether or not Hackley and Mc-

190 Conaghy have any other claims on that creek.

A. They have not; no, sir.

Q. Did you ever do anything to prevent them from holding the claims which you and Cahoon staked out?

A. No, sir; I didn't.

Q. If they lost them it was their own fault?

A. Yes, sir; it was.

By the COURT: That is a question for the jury.

Q. Now, Mr. Lewis, when you and Mr. Cahoon went back to restake these claims, when you got up there, where did you camp?

A. We camped right on the Cahoon creek.

Q. Then, was it before or after you had restaked these claims that Mr. Cahoon staked the claims on Cahoon creek?

A. We had been there two days, and the next morning we started out and Mr. Cahoon went back.

Q. How far had he to go?

Q. About one hundred and fifty or two hundred yards.

Q. How far did you have to go up the McKinley creek to stake the Hall and Chisholm claims?

A. Two and a half miles, possibly three.
Q. From Sunshine camp?
A. No, sir; from where we were camped.
Q. Now, there was some question as to whether or not you removed this notice that Mr. Cahoon placed upon that snag; what was the reason that you did not do it?
A. I didn't think it was necessary; we didn't pay any attention to it.

191 Recross-examination:

Q. You just stated a minute ago that Hackley and McConaghy owned in these eight claims with you?
A. They do.
Q. Did you state that if McConaghy and Hackley lost these claims they would not have an interest in the company, but in case that Hall and Chisholm lost they would have an interest?
A. No, sir; they have an interest with the other boys.
Q. When you stated that Hackley and McConaghy would have no interest if they lost these claims, do you mean they would have no interest in the balance of the claims?
A. No, sir; they have an interest.

Redirect examination resumed:

Q. There are other claims belonging to the plaintiff company besides these two claims in controversy?
A. Yes, sir; there are.

192 C. A. WEST, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. You are one of the defendants in this case?
A. I am.
Q. How long have you been acquainted with Cahoon?
A. I have been acquainted with him since I came up on the boat from Seattle, last February a year ago.
Q. The same time Hall came up?
A. Yes, sir.
Q. Lewis and the others?
A. Yes, sir.
Q. When did you get acquainted with the other defendants in this case?
A. I got acquainted with them last year, going up on the trail, in March—that is, with Hanson.
Q. When did you get acquainted with the rest of the defendants?
A. I got acquainted with Charlie Leitch on the boat coming up, and Mr. McConaghy and Wooden I got acquainted with them last summer, in August; Mr. Hawes I got acquainted — also on the boat coming up.

Q. How long have you known Chisholm, Hall, Sutherland, and Dalton?

A. I saw Mr. Dalton going in on the trail last spring; I haven't been acquainted with him. Hanson, I got acquainted with
193 him going in on the trail; and Chisholm and Hall, I met them at Camp Pleasent.

Q. State to the jury what time you left Camp Pleasent last fall, whether before or after Cahoon left.

A. I think, two or three days before they left.

Q. Who did you leave Camp Pleasant with?

A. Leitch, Wooden, and McConaghy.

Q. Had you been working there?

A. No, sir.

Q. What did you start out for?

A. Prospecting on Porcupine.

Q. When did you meet Cahoon, Hanson, and Sutherland after they had left Camp Pleasent?

A. In the afternoon of the 5th of October.

Q. Where?

A. Just a little below the mouth of McKinley creek.

Q. Were you along there about the same time the rest of the boys met Cahoon and his party?

A. Yes, sir.

Q. Now, what did you do then? Did you go up the creek with them?

A. No, sir; we went down to the mouth of the Porcupine—down to the camp.

Q. When did you next see Cahoon, Sutherland, and Hanson?

A. I saw Cahoon on the 6th, in the afternoon, and Sutherland and Hanson and Hackley about noon on the 7th.

Q. Where did you see them?

A. Mr. McKinley creek.

Q. What were they doing there?

A. Just came to the camp then.

194 Q. On the 7th?

A. Yes, sir.

Q. What became, then, of Hanson and Sutherland?

A. They went to Pleasent camp that afternoon.

Q. With whom?

A. Cahoon.

Q. Were you there and heard a conversation that took place before Cahoon left to go back to Pleasent camp between Cahoon and Lewis in regard to any staking on McKinley creek?

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial. Objection overruled by the court.

A. I were.

Q. What took place?

A. At the time that Hackley, Sutherland, and Hanson came into the camp, Hackley asked Cahoon the reason that he didn't cut off

the notice. He told him that he didn't have time, it was so late, so he couldn't do it. He says, I will authorize you to take them off, and Hackley said, I won't do it, and then he said, I will authorize Lewis to take them off and stake them further up the creek.

Q. That was about all that took place there, then?

A. Yes, sir; they left for Pleasent camp.

Q. What did you boys who were left there do the next day?

A. The next day we went into the creek and were staking claims.

195 Q. Who did you help stake that day—what claims?

A. Wooden's claim, No. 4, Charlie Leitch's, my own, Mr. Hawes', Mr. Hall's, and Mr. Chisholm's and Joe Henry's.

Q. What claims on this map and plat were staked out for Chisholm and Hall and Hawes?

A. Nos. 10, 11, and 12.

Q. Then you boys staked up there that day and got through; and where did you go then?

A. We went back to camp.

Q. Did you help to stake out McConaghy and Hackley's claim that day?

A. No, sir.

Q. When was it you again met any of these plaintiffs in this case, Dalton or Hanson?

A. I met Hanson on the 10th, I believe, coming over from Boulder creek, and on the 11th we went down to Camp Sunshine.

Q. Who did you meet there? Were you there at this meeting where all the plaintiffs in this case was present except Dalton, and all the defendants present except Hackley?

A. I were.

Q. State what conversation took place there in regard to these claims.

A. We called a meeting there about these claims.

Q. What claims?

A. Nos. 11 and 12.

Q. Marked Chisholm and Hall?

A. Yes, sir.

196 Q. Tell the conversation.

A. Mr. Hall, he said that Mr. Chisholm had told him that he couldn't conscientiously go on the witness stand and swear that he had a claim because Lewis had staked the claim for him and not Mr. Cahoon, and so Mr. Cahoon offered to go back and restake these claims or sign his name to it, to the stakes.

Q. Was Chisholm and Hall and all the plaintiffs there at that time, at the time that this conversation took place, except Dalton?

A. Yes, sir.

Q. And all you boys except Hackley?

A. Yes, sir.

Q. What was further said about this?

A. They were starting off. Cahoon was going back to sign his name to the stakes, and he offered to pay Cahoon for going back—to pay him for his time—and Cahoon told him he wouldn't take any

pay. He said, I started out to do that and I will do it right, even if it takes me all fall; then he said, I will get some grub from Buckman's camp.

Q. Who said that?

A. Peter Hall.

Q. He said he would go and get the grub?

A. Yes, sir.

Q. Go ahead.

A. Then Mr. Lewis offered to go back with him, and the next morning Mr. Cahoon and Lewis left.

Q. When did Hall and Chisholm leave?

A. About the same time as they did.

197 Q. Where did they leave for?

A. Chilkat.

Q. What were they going down there for, if you know?

A. I know; yes, sir.

Q. What were they going down there for? For what purpose?

A. For the purpose of drawing up papers. We were all to meet and draw up papers for the company.

Q. Now, you heard Sutherland testify in this case yesterday?

A. Yes, sir.

Q. And you heard him testify upon the witness stand at Skaguay?

A. I did.

Q. You heard him testify yesterday that he was the first one to find gold?

Q. Did he testify to anything of that kind at Skaguay?

A. No, sir.

Q. What did he say?

A. He said he didn't know; he thought Hackley was the one that found the gold first.

Q. Did you hear Hall's testimony here yesterday?

A. I did.

Q. And also at Skaguay?

A. I did.

Q. What was his testimony at Skaguay as to what Lewis and Cahoon went back up the creek for?

A. He said he didn't know.

Q. Did you finally go on down to Pyramid Harbor?

A. Down to Chilkat.

198 Q. When did you get there and who did you find there?

A. To Chilkat?

Q. Yes.

A. We met Hall, Chisholm, Sutherland, and Hanson.

Q. How long did these parties stay there then?

A. I believe somewhere about three or four days.

Q. Then what became of them?

A. Well, they came over and asked Mr. Hawes if he wanted to go along with them and to go and see what became of Cahoon and Lewis. Hawes was the partner of Cahoon and he was willing to go.

Q. How many started out on that errand?

A. All of them; Dalton with them.
Q. Did you go with them?
A. No, sir.
Q. When did you next see anything of these parties?
A. I didn't see any of them until in Juneau, coming down on the boat Faralon, I met Mr. Sutherland.
Q. Did this party find Cahoon and Lewis?
A. No, sir.
A. Didn't find them?
A. No, sir.
Q. That was about what date, do you remember?
A. I think either on the 17 or 18 of October.
Q. The same trip on which Chisholm and Hall went on up and put up this notice on the two claims in controversy?
A. Yes, sir.

199 Cross-examination by Mr. MALONY:

Q. This trial last year lasted about three days?
A. Not quite.
Q. How long ago was it since that trial?
A. It was in June.
Q. You remember everything that was said, of course, at that time?
A. Pretty near.
Q. Among other things that you remember of this testimony was about the discovery of gold?
A. Yes, sir.
Q. How long is it since that meeting at Pleasent camp that you overheard this conversation; how long since this meeting at Sunshine camp?
A. Last October a year ago.
Q. You remember everything?
A. Yes, sir.
Q. You are one of these claimants?
A. I am.
Q. You are interested in the claims in controversy?
A. I suppose I am.
Q. Do you know anything about Cahoon's agency to locate for Chisholm and Hall?
A. I didn't see him get the power of attorney.
Q. Did you see him locate these claims?
A. No, sir.
Q. You know nothing about that?
A. No, sir.
Q. The only thing you pretend to know is what Cahoon
200 told Lewis?
A. I heard that.
Q. Do you know whether Cahoon had any authority to make it or not?
A. I suppose he said that.

Q. He said so?
A. Yes, sir.
Q. He told you?
A. That he had a power of attorney, and I have seen it since.
Q. You *you* didn't know at that time whether he had any authority or not?
A. No, sir.
Q. You didn't go back with Lewis when he made that?
A. What?
Q. The location for Chisholm and Hall.
A. I was along the first time. I didn't go back from Camp Sunshine.
Q. You were along with Cahoon and Lewis?
A. No, sir.
Q. You don't know whether they made a relocation there or not?
A. No, sir.
Q. You don't know anything about the original location of Chisholm and Hall?
A. Yes; I saw the original location.
Q. The location made by Cahoon for Chisholm and Hall?
A. No, sir.
Q. So that part of it you know nothing about?
A. No, sir.

201 Q. The only thing you do know about is this conversation that you claim *you claim* you heard Cahoon, Lewis, and Hackley?
A. Yes, sir.
Q. Was Chisholm and Hall present at that time?
A. No, sir.

Redirect examination:

Q. You know about these other things that you have testified to down to Camp Sunshine?
A. Of course, I do know.

202 B. L. WOODEN, called on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. Mr. Wooden, you are one of the defendants in this case?
A. I am.
Q. Do you know all the parties making up the plaintiff company, do you, and the defendants, do you?
A. Yes, sir.
Q. Where did you first become acquainted with Cahoon and the rest of the parties making up the defendant company?
A. I came from Colorado with Mr. McConaghy.
Q. You knew him in Colorado?
A. Yes, sir.
Q. Where did you meet the other boys of the company?

A. I met Mr. Hall going down to Chilkat a year ago last spring.
Q. You got acquainted with them since you came to Alaska?
A. Yes, sir.
Q. How long have you known the parties that make up the plaintiff company?
A. I am not personally acquainted with Mr. Dalton; I have known him by sight ever since we first struck the country.
Q. How long have you been acquainted with the other boys?
A. I first saw Mr. Chisholm and Mr. Sutherland at Camp Pleasent a year ago last fall.
Q. When did you leave Camp Pleasent?
203 A. I couldn't give the exact date.
Q. Did you leave before Cahoon left?
A. Yes, sir.
Q. Who did you leave there with?
A. I left there with McConaghy, Lewis, Leitch, West, Joe Henry, and myself.
Q. When did you see Cahoon, Hanson, and Sutherland?
A. As we came down from the right-hand fork of the Porcupine.
Q. Had you been out prospecting?
A. Yes, sir; we were going down to Boulder creek and that night Mr. Hackley came into camp and camped with us and the next day we went over and went up Porcupine. Then, at the time that Cahoon came along with Hanson and Sutherland, the other boys met them there.
Q. Did you see Cahoon and his party at that time?
A. I saw Cahoon, Hanson, and Sutherland.
Q. You didn't go up McKinley creek with Cahoon, Hackley, Hanson, and Sutherland, did you?
A. No, sir; I went on down to the mouth with the other boys.
Q. When was it after that that you saw any of the rest of Cahoon's party—that is, Cahoon, Sutherland, and Hanson?
A. The next I saw of them was at the time they came up to meet us, the morning that Hanson and Cahoon came over from Boulder creek.
Q. You were not in camp when Mr. Cahoon and Sutherland and Hanson left to go back to Pleasent camp?
A. No, sir; Mr. Leitch were down at the mouth of the creek.
Q. Then the next you saw *to* Cahoon was when he had been at Pleasent camp and returned with Hall and Chisholm and
204 Sutherland and Hanson?
A. Yes, sir.
Q. Where did you see them?
A. At Porcupine; the other boys was at Boulder. They staid their- and waited for us, and we staid at our camp that night, and the next day we went down to Sunshine and met the other boys.
Q. There you met Chisholm, Hall, Hanson, Sutherland, and Hawes, and all the defendants except Hackley?
A. Yes, sir.
Q. Just what conversation in the presence of Hall and Chisholm

and the other parties took place between you boys and these parties in regard to these claims?

A. The question was about the legality of these claims.

Q. What claims?

A. The claims that Lewis had staked above.

Q. The Hall and Chisholm claim marked on the map?

A. Marked on the map 11 and 12.

Q. Now state to the court and jury what that conversation was.

A. Well, they didn't think the claims would be legal, staked in that way. Mr. Hall said that Mr. Chisholm was consciencious and he couldn't swear that he had any claim staked in that manner, and Mr. Cahoon said that he would go back, that he was will- to go back and restake them himself, and Mr. Hall offered to pay him for it; he said he didn't want any pay—he had started to do it right and he would do it if it took him all fall—and Mr. Hall said, I will
205 furnish the grub from Buckman camp, and Mr. Lewis volunteered to go back with him and Hanson furnished the blanket and pack-strap.

Q. Did Hall get the grub for him?

A. Yes, sir.

Q. Now, Mr. Wooden, what became of Chisholm and Hall?

A. They went on down after those boys left; about the same time that Cahoon and Lewis started to go back to McKinley creek. We left for Chilkat, the crowd to meet there.

Q. What for?

A. To draw up papers for the company which we had already agreed upon.

Q. You heard Hall testify at Skaguay, too, did you not?

A. Yes, sir.

Q. Did he ever say anything in his testimony at Skaguay about going down from Sunshine to Chilkat for the purpose *for the purpose* of making out papers to record?

A. I never heard him say it.

Q. What did he testify at Skaguay that he left Sunshine to go to Chilkat for? In his testimony at Skaguay the reason you left Sunshine to go down to Chilkat?

A. I don't remember.

Q. Did he say anything about going to record papers down there?

Counsel for the plaintiff objected to the above question for the reason that the same is not proper.

By the COURT: He has just answered that.

206 Counsel for the defendant duly excepted to the ruling of the court.

Q. Now, did you hear Sutherland's testimony at Skaguay?

A. I did.

Q. Did you hear him testify who was the first discoveror of gold upon the Hackley and McConaghy claim?

A. I heard him testify that he didn't know.

Q. You heard him testify here yesterday?

A. Yes, sir.

Cross-examination by Mr. MALONY:

Q. You were not present when Cahoon located these claims?
A. No, sir.
Q. You heard Cahoon testify?
A. Yes, sir.
Q. Mr. West?
A. Yes, sir.
Q. How long ago is it since that meeting at Sunshine there?
A. A year ago last October.
Q. Did you notice that Mr. Cahoon and Mr. West used the same words in describing that conversation?
A. I remember particularly——
Q. Answer the question. Did you notice Mr. Cahoon and Mr West used the same words in describing that conversation?
A. I suppose they did.
Q. It didn't strike you as being remarkable at all?
A. No, sir.
Q. Did you talk it over with them?
A. What?
207 Q. About that conversation there?
A. When?
Q. At Camp Sunshine, a year ago.
A. Talk it over with them there? Certainly.
Q. Did you talk it over, what your testimony would be?
A. I don't know what you mean.

(By the COURT:)

Q. Have you talked with Cahoon and West and these other persons?
A. In regard to what my testimony would be? No, sir.
Q. As to what was said and done there?
A. Why, certainly.
Q. You arrived at the same conclusion and used the same words did you?
A. Why, I never arrived at any conclusion of that kind.
Q. Did you use the same words in your testimony?
A. Well, we have to.
Q. You stated already that you didn't know anything about the location made by Cahoon?
A. Yes, sir; I did.

Redirect examination:

Q. How came you witnesses to use the same words?
A. That is the conversation.
Q. You testified to that because that is the exact words they used?

Counsel for the plaintiff objected to the above question for the reason that the same is leading.
208 Question withdrawn.

Q. Then because you testified to it is because it was the exact words he used?
A. Certainly.

Recross-examination:

Q. Did Cahoon and Lewis hear what he said?
A. They heard what he said in the cabin.

209 CHARLES P. LEITCH, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. You are one of the defendants in this case?
A. Yes, sir.
Q. Did you know any of the defendants in this case before you came to Alaska?
A. Yes, sir; I met some a year ago last February.
Q. Was that on the same steamer that Mr. Hall and some of the defendants came up on?
A. Yes, sir.
Q. When did you become acquainted with Hall and Chisholm?
A. Mr. Hall I met on the steamer.
Q. I mean Hanson, Sutherland, Chisholm, and Dalton.
A. I didn't get acquainted with Mr. Hanson at all. I don't think I got acquainted with him until I met him on the creek in October. Mr. Sutherland at the same time, and Mr. Chisholm I had seen at Camp Pleasent, but was not acquainted with him until I saw him at Sunshine camp.
Q. You are one of the parties that left Pleasent camp with Mr. Lewis and some of the other defendants prior to the time that Cahoon and his party left there?
A. Yes, sir.
Q. Where did you first see Cahoon, Hanson, and Sutherland after they left Pleasent camp?
A. On October the 5th. We had come from up the Porcupine, and we met them about 300 feet or so below the mouth of
210 McKinley.
Q. Had you been prospecting with these other parties?
A. Yes, sir.
Q. Hackley, Lewis, and those parties?
A. Yes, sir.
Q. What was done at the time you met Cahoon, Hanson, and Sutherland at the forks of the Porcupine and McKinley?
A. We had a little conversation.
Q. Pass over any conversation you hand.
A. Well, we proceeded on to the mouth of the Porcupine.
Q. What became of Hackley?
A. They were behind us.
Q. You heard Hackley suggest going up the McKinley?
A. I was on the creek a little ahead.

Q. You didn't hear that?

A. No, sir.

Q. When was the next you saw either Cahoon or any one of the plaintiffs in this case?

A. I didn't see them until about the 10th; they returned from Boulder creek.

Q. Then were you at the camp at the time that Cahoon had some conversation with Lewis about Lewis staking claims?

A. No, sir; I wasn't there.

Q. Then then first time that you saw Cahoon and Hanson, Chisholm and Sutherland after that was at the time that they returned from Pleasent camp, Mr. Cahoon returned?

A. I saw them at Sunshine camp; Chrisholm and Hall didn't come up the creek.

Q. Were you at Sunshine camp at the time any conversa-
211 tion took place between the defendant and the boys belonging to the plaintiff?

A. Yes, sir.

Q. In regard to these claims?

A. Yes, sir.

Q. State briefly, Mr. Leitch, what took place there between Hanson, Sutherland, Hall, and Chisholm and the defendants in this case.

A. Why, Hall and Chisholm seemed to be dissatisfied about the two claims that Mr. Lewis staked for them on the creek. They thought he had no right to stake them, and Mr. Cahoon offered to go back and restake them, and Mr. Hall, when Mr. Cahoon offered to go back, he offered to pay him for his services and furnish the grub from Buckman's camp, and Mr. Cahoon refused to take any money. He said he had started out to do the thing properly and he would do it if it took him all fall.

Q. Then these provisions were supplied?

A. Yes, sir. Mr. Hall got them from Buckman's camp, and he said he would make it all right with Buckman when he saw him.

Q. Were you there when Cahoon and Lewis left the camp?

A. Yes, sir; we left about the same time.

Q. With whom did you leave?

A. Mr. West, Mr. Hawes, Wooden, and McConaghy; I believe that is all.

Q. Where did you go to?

A. That day as far as Walker camp, about five or six miles.

Q. On your way to Chilkat?

212 A. Yes, sir.

Q. What purpose?

A. To have papers drawn up for this company.

Q. Was there anything said at that time or at any other time about you boys going down, including the plaintiff in this case, to Chilkat or Pyramid Harbor for the purpose of making out a location notice and have them recorded at Juneau?

A. No, sir.

Q. Did you hear Hall or Chisholm say anything about it?

A. No, sir; not a thing.
Q. Then you went on down there, did you?
A. Yes, sir.
Q. Now, did you hear Sutherland testify in this case at Skaguay?
A. Yes, sir.
Q. What did he say there as to who was the first discoverer of gold on either one of these claims in controversy?
A. He didn't tell.
Q. You also heard Hall's testimony at Skaguay in regard as to whether he knew or not the purpose for which Lewis and Cahoon left Sunshine camp to go up McKinley Creek, did you not?
A. Yes, sir.
Q. Do you remember what he testified on that at Skaguay?
A. He said he didn't know what they were going back for at all.

213 Cross-examination by Mr. MALONY:

Q. You were up at Camp Pleasent when Cahoon, Chisholm, and Hall met there?
A. No, sir; not at the time they met.
Q. Were you present on the 6th day of October on McKinley creek?
A. No, sir.
Q. You were present in Sunshine camp some days afterwards when the conversation took place?
A. Yes, sir.
Q. State to the jury the conversation.
A. Hall and Chisholm said that they were dis-atisfied with Lewis having staked the upper claims; *there* were afraid they wouldn't hold, and Mr. Cahoon offered to go back and locate them himself, and Mr. Hall offered to pay him if he would go back, and furnish the grub from Mr. Buckman's camp.
Q. You heard that conversation yourself?
A. Yes, sir.
Q. Who was it between?
A. The whole crowd up there.
Q. You was taking part?
A. I suppose so.
Q. Hackley?
A. Hackley wasn't there.
Q. Lewis?
A. Lewis was there.
Q. All there with the exception of Hackley and Dalton?
A. Yes, sir.
214 Q. And all talking?
A. Yes, sir; all talking. I don't know as I did any talking.
Q. Who did the talking?
A. Mr. Hall had most to say on his side.
Q. And Mr. Cahoon seemed to be on the other side?
A. Yes; that may be.
Q. You own an interest in these two claims in dispute?

A. Yes, sir.
Q. But not at that time?
A. No, sir; and I was in a sense, too.
Q. You stated that Mr. Hall and Mr. Chisholm and these people went down to Pyramid Harbor for the purpose of getting papers made out?
A. Yes, sir.
Q. Who was to make out the papers?
A. I always understood Sil Ripinsky was a notary public.
Q. Did anybody mention Sol Ripinsky?
A. I don't know as they did.
Q. You surmised that they were going before Sol Ripinsky to make out the papers?
A. That was the only man to go to.
Q. Did anybody tell you?
A. No, sir; there didn't anybody tell me.
Q. Was it Sol Ripinsky's business to attend to this matter?
A. I supposed he was a notary public.
Q. From whom did you understand it?
A. From the fact that he was a notary public.
Q. Did anybody in this party tell you?
A. No, sir.
Q. You knew that Sol Ripinsky was an Indian trader?
215 A. No, sir; I did not.
Q. You didn't know that he had a store?
A. I knew he was a trader, and knew that he carried on a business there.
Q. You testified also that you heard the testimony at the other trial?
A. I did.
Q. You remember everything that took place?
A. Not word for word.
Q. You remember distinctly that Mr. Sutherland claims that he didn't know who discovered the gold?
A. Yes, sir.
Q. You also remember the conversation at Sunshine camp about Hall?
A. Yes, sir.
Q. About a year ago?
A. Yes, sir.
Q. You remember that distinctly?
A. Very distinctly.
Q. Just repeat that conversation at Sunshine camp.
A. Mr. Hall said that Chisholm was such a consciencious man that he didn't believe he could go on the witness stand and swear that he owned those claims; those are very nearly the words he used.
Q. How long have you been in the mining business?
A. About two years.
Q. Do you know a man don't have to swear to his location?

A. Yes, I do; but it looked as though Mr. Chisholm didn't
216 know it.

Q. Did you know it at that time?

A. No, sir; I didn't.

Q. Do you think the other people did?

A. I don't know.

Q. You all thought a man had to swear to his location?

A. You do in the Northwest Territory.

Q. Are you an American or Canadian?

A. An American.

Q. How long were you in the Northwest Territory?

A. Six months.

Q. How many locations did you make?

A. I didn't make any.

Q. And you had to swear to them?

A. No, sir; I didn't have to swear to them.

217 W. S. HAWES, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. How old are you?

A. Fifty-two; will be my next birthday.

Q. You are acquainted, are you, with the plaintiffs and defendants in this suit?

A. I am.

Q. You and Mr. Cahoon came to Alaska together?

A. Yes, sir.

Q. You knew him before you came here?

A. Yes, sir. I have known him about fourteen years.

Q. What did you and Mr. Cahoon commence doing as soon as you arrived in Alaska?

A. We started in over the Dalton trail to a place called Alder creek, in the Northwest Territory.

Q. What doing?

A. Sledding our outfit in.

Q. Did you go into the mercantile business or mining?

A. Mining.

Q. Did you come up here for that purpose?

A. Yes, sir.

Q. How long did you and Mr. Cahoon spend in that part of the country before you returned to Pleasant camp?

A. We left the mission on the 7th of March, and we were in that country until about the 15th of September the same year; in the neighborhood of the 15th.

Q. Then you came on down over the Dalton trail as far as
218 Pleasant camp?

A. Yes, sir.

Q. For what purpose did you leave up there?

A. We came down for the purpose of prospecting on our way out—

coming out to winter. We didn't like to winter inside and we started early for the purpose of prospecting on our way out.

Q. What time did you arrive at Pleasent camp?

A. On or about the 15th of September.

Q. What did you do?

Q. We hired out to work for Mr. Dalton. Mr. Chisholm hired us. I understood he was the foreman, but that it was Mr. Dalton that we were working for.

Q. Do you know anything about the arrangement by and under which Mr. Cahoon, Mr. Hanson, and Sutherland left Pleasent camp and started out on this prospecting tour some time in October, '98?

A. I do. I know all about it.

Q. You were there at that time?

A. I was.

Q. You and Cahoon have been prospecting together? You are the same party that has been referred to as his partner?

A. I presume so. I was his partner.

Q. Mr. Hawes, I wish you would state slowly and give the details of the conversation between these men, Hanson and Sutherland, Cahoon, Chisholm, and Hall and yourself, just prior to Cahoon's party leaving Pleasent camp on about some time, the 3rd or 4th of October or the 1st of October, '98.

A. The first I heard about their going we had been talking all the time, and a party had been up there and showed us some
219 gold that he had found on Porcupine. The first I heard was the night before they started down—I mean Mr. Hanson, Mr. Chisholm, Mr. Hall, and Mr. Cahoon. I was doing the cooking at the time. That was the first talk I heard about it.

Q. State to the jury what conversation was had between the parties about starting out.

A. I think it was Cahoon. I am not positive. He says he wanted to go down to Porcupine tomorrow to prospect, and I said, I would like to go, but I can't leave now because I have got to stay here until Dalton sends some one to take my place. I had charge at that time of the stores. Says I, You take a power of attorney and if you find anything stake a claim for me, and he says, I don't know as it will be any good, but if we find anything you can come down and restake it, and I will take a power of attorney and stake a claim for you if I find anything, and the next morning after breakfast we gave him a power of attorney.

Q. Who made it out?

A. Mr. Cahoon. He offered to take one also for Mr. Hall and Mr. Chisholm.

Q. Were you present?

A. Yes, sir.

Q. Who first mentioned that matter?

A. Mr. Cahoon mentioned it. He was going to take a power of attorney for me, and he offered to take one for them also.

Q. What did they say?

A. They were very glad to have him. They were in a
220 hurry to build the cabin, and he sat down at a table in the

cook tent and wrote this power of attorney out, and we signed it just before they started.

Q. You heard some considerable talk about this grub-stake business. Tell the jury what about this matter of furnishing provisions by these parties, and who did it and how it came about.

A. The tea and rice and two boxes of hard bread and at least five pounds of bacon was our own stuff we had brought out from Dalton's post, and the rest was taken from Mr. Hall's cache. I don't know what it was. I didn't see it; probably it was flour and sugar.

Q. These matters you have just mentioned as being provisions belonging to you and Cahoon. Did you see these fixed up and go into this account of provisions and grub?

A. I certainly did. I brought it out from the post, and I know what was in the knapsa*k*e. I know that he took the knapsack along with the provisions left in it.

Q. Do you think of anything else, Mr. Hawes, that transpired between the parties before they left in regard to this grub and staking claims?

A. No more than what I have stated; Mr. Hall went with me. I think we went and goo the stuff. I think the last thing they done he wrote the power of attorney, and they signed it. I didn't go. I understood they got the stuff. I saw them go and come back with it.

Q. You know that the stuff was taken that belonged to Cahoon and yourself?

A. I do.

221 Q. Did you continue to work at Pleasent camp?

A. I worked there until they returned.

Q. Until Hanson, Sutherland, and Cahoon returned?

A. Yes, sir.

Q. Were you present at the time that any conversation took place between Hall, Cahoon, Hanson, or any of these parties upon Cahoon's return from McKinley creek?

A. I was.

Q. State where it took place and who was present.

A. The first conversation I hear, and I think I heard the first, was in the store or house.

Q. Who was present at that time?

A. Mr. Hall was there, Mr. Cahoon was there, and Mr. Chisholm; I don't know whether Hanson and Sutherland was in there or not, and I was there myself.

Q. State to the jury what conversation took place between Cahoon, Hall, and Chisholm at this time.

A. The first I remember, the first words spoken, they was standing there and another man entered, and they didn't say anything; I waited until he went out of the house; that was Al Lowe; he knew nothing about the find or strike, and I spoke up and said, Did you find anything, boys? and they says, Yes. Hanson, I think, says, Yes; we have found it very rich; and I says, Did you stake me a claim? Yes, he says; I staked all claims temporarily; the boys are going to measure up the ground and going to stake off 12 claims, and I come over to notify you to meet over at Boulder creek tomor-

row night; we agreed to meet at Boulder creek and we
222 & 223 will go down to Chilkat and fix the matter up, and he said, We are going to put the claims into a pool and work together as a company, and they all seemed to be very much pleased with it.

Q. Now, Mr. Hawes, he said that the boys was going to measure up and lay out the claims—what boys did he mean?

A. He meant the remainder of the party left on the creek—Lewis, Wooden, McConaghy, Hackley, Leitch, and West.

Q. Did anything else take place in the way of a conversation about these claims between these parties?

A. Not that I remember of; not at that time. We was talking, of course, about it, but nothing that has any bearing on this case.

Q. When was this conversation, in the forenoon of the day?

A. In the afternoon. Mr. Dalton came out from Dawson along with Mr. Lowe.

Q. When was this conversation?

A. In the afternoon; I could't tell you the time; it might have been seven o'clock.

Q. How long had Cahoon and Hanson and Sutherland been in camp before this conversation took place?

A. Probably not over ten or fifteen minutes; maybe not over ten, I don't think.

Q. Now, when this party started out again what did they start out for from Pleasent camp?

A. We started to go to Chilkat. We expected to go to Boulder and meet the boys—the rest of the party from Porcupine. They expected to be down the same night that we reached Boulder.

Q. You left Pleasent camp with Hall, Chisholm, Sutherland, and Cahoon?

224 A. I did.

Q. Started for Chilkat?

A. Yes, sir.

Q. What were you going down there for?

A. To draw up our papers and complete our company arrangements.

Q. On your way down did you meet the other parties and the boys who constitute the defendant company here anywhere?

A. We didn't meet them at Boulder; we staid there over night, and the next morning Mr. Hanson and Mr. Cahoon started out to go up and see what had become of them, and we came on to Sunshine and waited there.

Q. Did you all meet at Sunshine?

A. We did, with the exception of Mr. Hackley; he passed on with the pack-horses, and the rest came to the camp.

Q. Now, was there any conversation that took place at Sunshine camp, where Hall and Chisholm and these other plaintiffs were present, together with the defendants, except Hackley and except Dalton?

A. Yes, sir.

Q. State it to the jury.

A. We staid there all that day and they didn't come from Porcupine until late the next day, about noon; it took them longer to do the work; the nature of the ground was very rough there, and it took them longer and we waited until they came, and before they came Mr. Hall raised an objection to restaking the upper claims.

225 He spoke about that coming to Sunshine, and I told him I was in the same boat that he was; that my claim was one of the claims that they moved up, and he said he didn't think it would be legal, and I said I didn't think it was legal anyway. I had my doubts about the power of attorney, but I am satisfied to be placed up the creek; if I could hold it anywhere I could hold it there.

Q. You have seen this map and plat that has been drawn by Mr. Lewis in this case?

A. I don't know as I have ever seen the map; I know all about the creek and the claims.

Q. Now, what further took place there in the way of a conversation between you parties?

A. There wasn't much of anything said until the boys came; then Mr. Hall raised the objection about the claims being staked.

Q. What claims?

A. The three upper claims.

Q. Those the claims that Lewis staked?

A. Yes, sir; Mr. Cahoon says, If you think it is not legal, I will go back and rewrite the notices; I would like to have it right; and Hall says, If you do that and it will be all right.

Q. Was Chisholm there?

A. Yes, sir; all there.

Q. What else took place about preparing to go up there?

A. They had no provisions, and he says, I will get some provisions out of Buckman's camp.

Q. Who said that?

226 A. Mr. Hall said it, and he went and got the provisions and gave to Cahoon and Lewis, and Mr. Hanson let Mr. Cahoon and Mr. Lewis have his blankets, and we came on to Chilkat and waited there.

Q. What were you going to Chilkat for?

By the COURT: He has testified to that once.

Q. Was there anything said by either Hall or Chisholm or any one there at any time in your presence about going down to Chilkat for the purpose of making out location notices to have recorded?

A. I don't remember as there was. I think there was some talk about electing a recorder. There was no recorder there at that time. There might have been. I certainly did not hear anything of that kind. We could not have recorded anything at Chilkat without electing a recorder.

Q. Did you hear the testimony of Sutherland upon the witness stand, at Skaguay, upon the former trial of this case?

A. I did.

Q. Did you hear his testimony in regard as to who was the first discoverer of gold upon these claims in controversy?

A. I did.

Q. What was his testimony?

A. He said he didn't know whether he was the first discoverer or not. He thought at first he was, and then changed his mind and said he didn't know as he was.

Q. Did you hear also Hall's testimony upon the witness stand at that time at Skaguay?

A. I did.

Q. What did Hall say there with reference as to whether or not he knew for what purpose Cahoon and Lewis left Sunshine
227 camp and proceeded up McKinley creek the same day that you people left for Chilkat?

A. He said he didn't know what they went back for, or words to that effect. I think those were the words he used.

Q. You are the same man Hawes whose name is on the map here, and that is the order in which your claims lay in this series of claims, Mr. Hawes?

A. It is.

Counsel for the defendant offered the map in evidence, marked X and W, which has on one side the creeks, and on the other side it has an outline of the Porcupine creek, Cahoon creek, and McKinley creek, and also the claims that have been testified to.

COUNSEL FOR THE PLAINTIFF: Objection to the introduction of the map in evidence for the reason that there is nothing definate about the map; it is a simple drawing, without any measurements.

By the COURT: The objection is overruled, with the understanding that the map or plat is not a perfect map, either of the rivers or the locations, but simply an approximate drawing, and the jury will receive it as such.

The plat, being admitted in evidence by the court, was marked Defendant's Exhibit No. 2.

228 Cross-examination by Mr. MALONY:

Q. I believe you stated, Mr. Hawes, that you are an acquaintance of Mr. Cahoon's for about 14 years?

A. Yes, sir.

Q. You are now also an owner with Mr. Cahoon, your old friend of fourteen years' standing?

A. Yes, sir; I am.

Q. As against Mr. Hall and Mr. Chisholm and these other people?

A. Yes, sir.

Q. Were you present when Mr. Cahoon located these claims?

A. No, sir.

Q. I believe you said you knew all about what took place at the time the power of attorney was given?

A. I do.

Q. Hear all the conversation?

A. I did.

Q. Did you supply any of this grub?

A. Only what part I brought out from the interior.

Q. What part of the interior?

A. Alder creek, Northwest Territory, about forty miles from Dalton's post.
Q. Isn't it the other side of Dalton's post?
A. Forty miles.
Q. Isn't it 175 miles?
A. No, sir.
Q. Isn't it 75 miles from Dalton's post to Pleasent camp?
A. Yes, sir.
Q. How many days were you in coming out?
229 A. We were three days coming out from Dalton's post; we were five days and a half on the road, and we were ten or twelve days at Dalton's post.
Q. How much grub did you start with from Alder creek?
A. We have a little cache at the post.
Q. Who had the cache at the post?
A. Mr. Cahoon and I have one there now.
Q. You heard the conversation take place between Cahoon and Hall at that time?
A. Yes, sir.
Q. What kind of an outfit did Hall give Cahoon?
A. It was some grub that would have spoiled.
Q. How do you know it would?
A. I know it would. I had been there all summer. It was outdoors under a tree.
Q. Any cover to it at all?
A. Yes; there was some shakes. It was exposed to the weather. It was built up in a tree, and some boards on the side.
Q. You mean to tell the jury that in a cache of that kind the goods would spoil?
A. It would be apt to if it leaked.
Q. Did it leak?
A. Yes; it did.
Q. How do you know?
A. Because the goods were wet.
Q. Hall and Chisholm together got the stuff?
A. Chisholm didn't, as I know of.
Q. Do you know whether he did or not?
A. I don't think he did; I didn't see him.
Q. Didn't Chisholm get any stuff?
A. Not that I know of.
230 Q. Do you mean to swear that he didn't?
A. Yes; I will swear that he did; he didn't have any.
Q. You make that statement as strong as any other statement that you have made here?
A. Yes, sir.
Q. Do you know whether Chisholm got a part of that stuff?
A. I know he didn't.
Q. Do you know who they were working for in there?
A. Working for Dalton.
Q. Don't you know that Hall and Cahoon were working for Chisholm?

A. Mr. Dalton paid for our labor.
Q. Don't you know that Chisholm had a contract there?
A. I don't know. Mr. Chisholm told us he was the foreman there.
Q. Do you know who Hall and Cahoon were working for?
A. Mr. Dalton.
Q. For whom?
A. Mr. Dalton, I suppose; Mr. Dalton's man paid us and Mr. Chisholm hired us.
Q. You couldn't say which one you was working for?
A. I suppose the man who paid me.
Q. You got part of this outfit, too, did you?
A. It belonged to me and him together.
Q. What part did you get?
A. Tea, rice, bacon, two boxes of hard bread.
Q. How much tea?
A. Pretty near a pound.
Q. How much bacon?
A. Five or six pounds.
231 Q. Did you hear Cahoon testify about four pounds?
A. No, sir; it might have been five pounds and it might have been six.
Q. You know as a matter of fact Mr. Hall got part of that grub?
A. I know Mr. Hall furnished what we didn't have.
Q. You signed the power of attorney, did you?
A. I did.
Q. See if that is it (handing paper to witness).
A. That is my signature; I think it is the same paper.
Q. That is the same paper signed by Chisholm and Hall?
A. Yes, sir.
Q. Know at that time they got part of the outfit?
A. I do.
Q. Were you present when he came back?
A. I was.
Q. What time did he come back, what date?
A. The 8th day of October.
Q. At what time?
A. Half past 9; not later than 10 o'clock.
Q. What was you doing?
A. Cooking in the tent.
Q. Chisholm and Hall; where were they working?
A. On the new building.
Q. Did you go over when Cahoon came back?
A. I did.
Q. Who was there when Cahoon came back?
A. I think Al. Lowe; I think we were working—cleaning bacon Mr. Lowe got up in the meantime and left me; I think he
232 and I were cleaning bacon, and I waited until he went before any conversation was had whatever.
Q. Who went?
A. Mr. Loew went into the tent.

Q. When the conversation took place who was there?

A. Mr. Hall, Mr. Chisholm, and myself and Mr. Cahoon; Mr. Hanson and Mr. Sutherland might have been there on the outside.

Q. Did you know when Cahoon came?

A. I was there when he returned.

Q. Where?

A. Cleaning bacon in the building they put up.

Q. Are you sure of that?

A. I am certain I was in the building at that time.

Q. That building had been completed?

A. No, sir; the roof was on it and the sides up.

Q. Dalton didn't have the things in there?

A. Yes; I guess we put most of the things in before they went down on the prospecting trip.

Q. Were you and Al. Lowe there when Mr. Cahoon came?

A. I think so.

Q. You are sure of that?

A. I am.

Q. About as sure of that as anything else you have testified to?

A. Pretty near.

Q. When he came in what did he say the first thing?

A. I think I was the first one to speak. I asked him if he found anything, and Hanson said, Yes; we have found a good thing.

233 I know Hanson was there, because I recollect the answer, and I spoke up and said, Did you stake anything? and Cahoon said, Yes; I staked some claims, or partially staked them, and the boys are staking the whole creek.

Q. How long was it after Cahoon came in before Al. Loew went out?

A. Not more than ten minutes.

Q. During the time that Al. Lowe was in there was anything said about the staking?

A. Not a word.

Q. Why was it you didn't say anything while Al. Lowe was in there?

A. Because Mr. Lowe was a stranger to all the party and I didn't like to ask if they had found gold down there; they might not wish to tell the world at that time or tell any one.

Q. How long had you been at Camp Pleasent at that time?

A. I had been there twenty days.

Q. You knew Al. Lowe were one of the oldest men Jack Dalton had in his employ?

A. He said he was.

Q. You didn't know him as a stranger?

A. I wasn't acquainted with him.

Q. You knew he was one of the men employed by Jack Dalton?

A. He said he was.

Q. That was the only reason you had for concealing any conversation, because Al. Lowe was present?

A. Yes, sir.

Q. You waited fully ten minutes before you asked him?

234 A. Yes, sir.

Q. When you did ask him who else was present beside yourself?

A. I said Mr. Cahoon, Hr. Hanson I am sure, Mr. Hall, Mr. Chisholm, and myself.

Q. What did he say?

A. He said he had staked some claims, and that he had concluded to move our stakes up the creek, and he went on and described the character and nature of the ground and the nature of the work that would have to be done, and it was the purpose to form a company and put all the claims together, and they were all perfectly satisfied with the proposition.

Q. He told you that he had partially staked some claims?

A. Yes, sir.

Q. Had you given any one else power to stake claims? Look at this power of attorney.

By the COURT: The power of attorney is the best authority.

Q. He came back and told you that he had located for you?

A. He told me that they were staking these claims that day.

Q. You were also down at Camp Sunshine there when another conversation took place?

A. Yes, sir.

Q. Between whom did that conversation take place?

A. There was considerable conversation.

Q. With reference to the removal of these claims?

A. Not with reference to the removal. Mr. Hall spoke about these claims not being legally staked.

235 Q. Did he say anything about the lower claims?

A. Not a word.

Q. You had one of the lower claims?

A. I did.

Q. Will you point out to the jury where your lower claim was under the power of attorney there?

A. This is the one I always supposed was mine, marked Hawes.

Q. Now, will you state to the jury, Mr. Hawes, if under the power of attorney Nos. 2, 3, and 4 were not good why 11 and 12 would be so?

A. Well, I told you that they talked of forming a company, and the boys concluded to move us three up the creek, so if they didn't hold the other nine claims would be *go* -gether, and they agreed that if the power of attorney wasn't good we should share equally with the rest in the nine claims.

Q. Will you explain why if the power of attorney was not good at one end why it would be good at the other?

A. They wanted to get us on one end of the property.

Q. Did you expect this power of attorney would be good?

A. I didn't know.

Redirect examination.

Q. This lower claim here is owned by Lewis, now?
A. Yes, sir.
Q. How, if the power of attorney hadn't held you, had Lewis located down here at the mouth of these two creeks and
236 then have a gap between here of three claims and the other claims up here?

Counsel for the defendant objected to the above question for the reason that the same is improper and immaterial. Objection overruled by the court.

A. I say in case the power of attorney didn't hold we would have the claims altogether.
Q. I asked you if these three claims down here as first laid off didn't hold it would leave a gap between Lewis' claim and the other claims.
A. It certainly would; that is why the claims were moved up, to close that gap; we wanted our claims together.
Q. Was that talked to Hall and Chisholm also?
A. Yes, sir; they were perfectly satisfied with the proposition and even glad; it was talked that Mr. Chisholm would make a nice foreman the next year when we went in there to work.

Recross-examination:

Q. Who was in that gap then?
A. At that time in here?
Q. I asked you who was in that gap.
A. I can tell you who is in the gap now.
Q. Was there anybody in that gap then?
A. No, sir.
Q. Hadn't you located it?
A. Mr. Lewis had a claim and Hackley and McConaghy.
Q. Hadn't Chisholm a claim there?
A. No.
237 Q. Hadn't Cahoon located a claim for him?
A. Yes; the claim under the power of attorney.
Q. Where did the gap occur?
A. Between Lewis and Hanson.
Q. Why couldn't you fill the gap from the lower side and save trouble?
A. I don't know; I wasn't there; I don't know anything about it.

Redirect examination resumed:

Q. Who owns the next claim?
A. The next to the claim in dispute?
Q. Yes, sir.
A. Wooden.
Q. There is where the gap occurred?
A. Yes, sir.

Q. Mr. Hawes, you testified about starting back to look for Cahoon and Lewis?
A. Yes, sir.
Q. How far did you go back with that party?
A. As far as Boulder creek.
Q. Where did you go then?
A. Mr. Chisholm and I went over the mountain trail and couldn't see anything of them.
Q. Did you have a conversation with Hall and Chisholm on the way up there?
A. I did before I left Chilkat.
Q. What was that?
A. They came to me and said they would like to go back
238 and look for Cahoon and Lewis—they thought some accident might have happened, a snowslide, and they would go to their assistance—and requested me to go with them.

239 ALES MCCONAGHY, called on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. You are one of the defendants in this case?
A. I am.
Q. How long have you been acquainted with the defendants in this case?
A. Mr. Wooden and I came from Colorado together about a year ago last March, and then I met Mr. Hall in April, '98; then I met Mr. Cahoon in the summer time, at Dalton's post.
Q. The rest of them, besides the gentleman you came from Colorado with, you got acquainted with after you came to Alaska?
A. Yes, sir.
Q. And also all the plaintiff in this case after you came to Alaska?
A. Yes, sir.
Q. When did you come to Alaska?
A. In March, '98.
Q. Where did you come from?
A. Colorado.
Q. Is that your native State?
A. No, sir; I was born in Ireland.
Q. You are a citizen of the United States?
A. Yes, sir.
Q. You came up on this same boat with Cahoon and Hall?
A. No, sir.
240 Q. What did you commence doing after you got here?
A. I started packing my outfit over the Dalton trail.
Q. What did you come to do?
A. I was going to prospect on the White river.
Q. Where did you prospect first?
A. In the Northwest Territory.

Q. Did you go over the Dalton trail?
A. Yes, sir.
Q. When did you come back to Camp Pleasant?
A. September, '98.
Q. What did you do there?
A. Nothing.
Q. Just camped there, were you?
A. Yes, sir.
Q. When did you leave Camp Pleasent to start out again?
A. About the first of October.
Q. With whom?
A. With Mr. Lewis, Mr. Leitch, Mr. Wooden, and Mr. West.
Q. Was that before Cahoon left?
A. Yes, sir.
Q. When did you next see Cahoon and Sutherland and Hanson?
A. A little ways below the forks on the Porcupine.
Q. You were along there in that crowd, too, were you?
A. Yes, sir.
Q. Did you go on up the creek at that time with Hackley and Cahoon and Sutherland?
A. I came down to the mouth of the Porcupine.
Q. When did you see the parties again?
A. I seen Mr. Cahoon on the evening of the 6th of October.
241 Q. Where was that?
A. On the bank where they were camped.
Q. Were you in that crowd when the boys notified you of the discovery up there?
A. Yes, sir.
Q. Then you went up McKinley creek?
A. Yes, sir.
Q. When did you see Cahoon, Hanson, and Sutherland again after this?
A. I seen them on the 7th.
Q. You came along up there the same time as Mr. Lewis?
A. Yes, sir.
Q. You don't know anything about any staking on the 6th, except what was told you?
A. No, sir.
Q. Then when did you locate up there?
A. On the 8th.
Q. Who was with you when you located?
A. Mr. Hackley.
Q. The McConaghy clai- referred to here as No. 3—is that the claim that you staked on that date?
A. Yes, sir.
Q. Explain to the court and jury what you did in the way of staking out that claim on that date.
A. I cut off the side of a tree and put my notice on it—the same tree that Hackley put his notice on—and then I measured up the creek and put another stake up the creek.
Q. Who wrote that notice?

A. Mr. Lewis; he was along.

242 Q. Mr. Lewis was the party who wrote most of the notices?

A. Yes, sir.

Q. The notice was placed upon this tree that you marked?

A. Yes, sir.

Q. What was it written with?

A. An indel*la*ble pencil.

Q. I will ask you if this is your signature to *whic* paper which I hand you.

A. Yes, sir.

Counsel for the defendant offered the paper in evidence which has just been identified by the witness as being the location notice.

Counsel for the plaintiff objected to the introduction of the notice in evidence for the reason that the same is uncertain and has no reference to any permanent monument or natural object to identify the claim, and, further, that the witness has not testified that the notice is a copy or a substantial copy of the location notice posted upon the claim at the time of the location.

Counsel for the defendant withdrew the offer for the time being.

Q. Now, Mr. McConaghy, what time were you first on this claim that has been referred to as the McConaghy claim?

A. In the evening of the 6th of October.

Q. Did you ever discover any gold there?

A. Yes, sir.

243 Q. What date did you make a discovery?

A. On the 6th.

Q. I believe you said that you marked your notice on the same tree that Hackley made his on?

A. Yes, sir.

Q. At the upper end, what kind of a stake did you make there?

A. On a tree*t*.

Q. Was there any other notice on that particular tree besides the one you put on?

A. Mr. Wooden put his on there.

Q. Did you see this snag that has been talked of, Mr. McConaghy, that Mr. Cahoon wrote a notice on?

A. I didn't see it then; I seen it this summer.

Q. Where is your first stake in regard to that—about how far up the creek or down the creek from that stake?

A. About 250 feet, I should judge.

(By the COURT:)

Q. Where, above or below?

A. Below.

Q. Extending how many feet along the creek?

A. 1,350 feet, I think it is.

Q. Then you were there at the time that Hackley staked his, too?

A. Yes, sir.

Q. You assisted Hackley, did you?

A. Yes, sir.

Q. When did you see any of the rest of the party, Mr. McConaghy—that is, Hanson or any of the plaintiffs in this case?

A. I seen Mr. Hanson with Mr. Cahoon on the day of the 7th. I saw them in the camp.

244 Q. Were you there at the time some conversation that has been testified to here took place between Mr. Cahoon and Lewis about doing some restaking up the creek?

A. I was.

Q. What conversation took place between Hackley and Lewis and Cahoon? Was Sutherland and Hanson present?

A. Yes, sir.

Q. Tell what took place.

A. Hackley asked Mr. Cahoon if he had taken off that notice, and Cahoon told him no, but told him to do it, and Hackley said he wouldn't, and then he said he would authorize Mr. Lewis to do it.

Q. Did Lewis go up the creek with you the day you went up to stake the claims?

A. Yes, sir; Mr. Lewis was along with us.

Q. When did you next see the plaintiffs?

A. The next time I seen Hanson was at the mouth of the Porcupine, I think, on the 9th *of* the 10th; I wouldn't be certain.

Q. That was after Cahoon had returned, after he went back to Pleasant camp?

A. Yes, sir.

Q. Were you there at that time?

A. Yes, sir.

Q. Were you there at the time some conversation took place about some claims being restaked between Hall and Chisholm?

Counsel for the plaintiff objected to the above question for the reason that the same is leading.

245 Objection overruled by the court.

Q. About any restaking of claims at the time Hanson, Hall, and Chisholm were present?

A. Yes, sir; at Sunshine camp.

Q. State to the jury what was said there by these parties in the presence of Hall and Chisholm.

A. Mr. Hall and Mr. Chisholm said that they didn't think they had any claim on account of Mr. Lewis staking it, on account of him not having any power of attorney, and Mr. Cahoon said that if they thought that it wasn't legal he would go and legalize the stakes, and so Mr. Hall said he would pay him for it, and Mr. Cahoon said he didn't want any pay, and Mr. Hall said he would furnish the grub, and Mr. Lewis and him went back on McKinley.

Q. (By Juror GRANT): You say he and Lewis?

A. Mr. Cahoon and Lewis.

Q. You didn't go back with them?

A. No, sir.

Q. Did you leave Sunshine camp to go down to Chilkat?

A. Yes, sir.

Q. What did you go down there for?
A. To get the papers made out and fix up the company.
Q. Did Hall or Chisholm or any one of these plaintiffs here say anything about going down there to make out location notices and coming on down to Juneau to record them?
A. I didn't hear anything.
Q. Did you hear Hall and Chisholm and these parties testify at Skagway?
A. I did.
246 Q. Did either one of them testify anything about going down to Chilkat for the purpose of going on to Juneau for the purpose of having the paper recorded in that trial—did they?
A. No, sir.

Cross-examination by Mr. MALONY:

Q. You stated that they stated that the object of these people going down there was not to have their claims recorded at Juneau?
A. Yes, sir.
Q. Where did you have the location recorded?
A. I had mine recorded in Juneau.
Q. Didn't the rest of them?
A. I don't know.
Q. Look at that and see what that says on there. Look at this and see if this wasn't recorded in Juneau.
A. I never heard it talked over.
Q. You don't mean to contradict that record, do you?
A. No, sir.
Q. Were you up to Camp Pleasent when this power of attorney was given?
A. No, sir.
Q. Was any articles of partnership drawn up?
A. No, sir.
Q. There was none signed, was there?
A. No, sir.
Q. Were you down on McKinley creek on the 6th day of
247 October, when Cahoon located the claims?
A. No, sir.
Q. You don't know of your own knowledge whether they were located or not?
A. No, sir; I don't.
Q. Do you know whether they afterwards located a claims for Hawes on that day?
A. I couldn't say.
Q. Now, Mr. McConaghy, when did you first discover gold on McKinley creek?
A. The 6th day of October.
Q. What time of the day?
A. In the afternoon.
Q. Was that after Cahoon had been there?
A. I guess it was; he was up the creek at the time.

Q. These notices were up there at that time?
A. I couldn't tell; I didn't see them.
Q. You wouldn't say that they were not?
A. No, sir; I wouldn't say.
Q. Did you locate that day?
A. No, sir; I did not.
Q. Did you locate on the 6th?
A. No, sir.
Q. No- the 7th?
A. No, sir; it was *reasing* on the 7th.
Q. How long have you been in Alaska?
A. Eighteen or nineteen months.
Q. Did you discover gold on the 6th?
A. Yes, sir.
Q. Didn't locate?
248 A. No, sir; located on the 8th.
Q. At the time you located on the 8th did you see any notice for Chisholm and Hall up there?
A. No, sir; I did not.
Q. Did you have any knowledge that they had located there?
A. I heard it talked about.
Q. Did you look for it?
A. No; I did not.
Q. You didn't investigate at all?
A. No, sir.
Q. You didn't know whether it was ground that had been appropriated by somebody else or whether it was public domain?
A. I understood Cahoon was on the creek, but I didn't know where he was. He gave orders to change that and put the boys up the creek.
Q. When did he give the orders?
A. I think on the evening of the 7th.
Q. You didn't know where he had located, did you?
A. No, sir.
Q. You didn't know where he gave the orders to move them to, did you?
A. Yes, sir; to the upper end of the creek.
Q. How did you know where they were?
A. I heard him tell where to locate, at the upper end of the creek after they had located the rest.
Q. Had you been up where he located the rest?
A. No, sir.
Q. Do you know whether any upper claims were located or not?
249 A. No; I don't; I understood there was.
Q. You were down at Camp Sunshine and heard a conversation between Hall and Cahoon?
A. Yes, sir.
Q. What was the conversation that took place between Cahoon and Hall?

A. Hall and Chisholm seemed dis-atisfied; they didn't think they had a claim because Cahoon didn't locate himself.

Q. In the course of that conversation did you hear either Hall or Chisholm tell Cahoon that he could cut off the notices from the original location?

A. No; I didn't hear anything about that.

Q. You didn't hear any intimation from Hall or Chisholm that they had abandon- these claims?

A. I heard him tell him that if he would legalize the upper claims it would be all right.

Q. Did you hear either Hall or Chisholm say that they had abandon- these lower claims?

Counsel for the defendant objected to the above question for the reason that the same is improper, incompetent, and irrelevant and calling for a conclusion. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Did you hear them say that?

A. I did not.

Q. Will you state to the jury what you did hear them say?

250 A. I heard them say Hall said that Chisholm was so conscientious that he couldn't swear to having a claim up there on account of Cahoon not locating them.

Q. Are you sure conscientious is the word?

A. Yes, sir; I am.

Q. When he used that word, who all were present?

A. He used it to Wooden and I.

Q. Did you hear him tell it to Cahoon?

A. No, sir.

Q. The only one you heard him tell it to was you and Wooden?

A. Yes, sir.

Q. You didn't tell it to Cahoon?

A. I don't remember.

Q. Or Lewis?

A. I don't remember.

(By Juror DAVIS:)

Q. I understood you to say you found gold on the 6th of October?

A. Yes, sir.

(By Juror DAVIS:)

Q. In the bed of the creek or the bank of the creek?

A. On the bed and on the bank both.

Redirect examination:

Q. This matter was talked over there among the boys before they left, was it not?

A. Yes, sir.

251 C. G. LEWIS, recalled on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Judge WINN:

Q. Is that notice made out in your handwriting?
A. Yes, sir; it is.
Q. Did you write the notice, as testified by Mr. McConaghy, on his end stakes?
A. I did on one; I am not certain about the other.
Q. What about the notice on this stake in regard to being the same as this notice?
A. The one I wrote is a copy of this; it is a lower stake notice.
Q. What did you write that notice with?
A. An indel*l*ible pencil.

Counsel for the defendant offered in evidence the notice which has just been identified by the witness.

Counsel for the plaintiff objected to the introduction of the notice in evidence on the grounds that the same is not sufficient evidence of title, that it is not connected with any natural object or permanent monument, and that the description is not sufficient to entitle*d* it to be a notice of location. Objection overruled by the
252 court. The notice, being admitted in evidence by the court, was marked Defendant's Exhibit No. 3, and was read to the jury as follows:

"Lower-stake placer claim # 3.

"*Notice of Location.*

"Notice is hereby given that I locate and claim, under the United States mining laws, one claim on creek known as McKinley creek, 1,500 feet up creek from this notice and 300 feet on each side of center of creek bed, in district of Alaska. October 8, 1898, A. D.

"ALEX. McCONAGHY.

"Witness:
"C. G. LEWIS."

(Endorsed on back:) "Recorded on records of the Porcupine m'n'g dist. May 27, 1899. S. W. Mix, recorder. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 10 o'clock a. m. Oct. 21st, 1898, and was duly recorded in Book 6, Placers, on page 56 of the records of said district. Norman E. Malcolm, district recorder."

Cross-examination by Mr. MALONY:

Q. Did you write that yourself?
A. I did; yes, sir.
Q. That is the same notice you put on record?
A. Yes, sir.
Q. What claim?

A. The McConaghy claim; claim No. 3.
Q. What did you take the notice from?
A. I copied it from the stakes as we located them.

(By Juror DAVIS:)

Q. I understood you to say in your examination the only pencil you had was a black lead pencil?
253 A. No, sir.

(By Juror MOORE:)

Q. Didn't you state you wrote the notice on the snag with a black pencil?
A. I didn't write that notice.

Redirect examination:

Q. Your pencil was an indel*la*ble one?
A. Yes, sir.
Q. What color?
A. A sort of a purple.
Q. Did you see the notice on the snag?
A. Yes, sir.
Q. What was it written with?
A. A black lead pencil.

Recross-examination:

Q. How long after the writing did you see it?
A. This spring and last fall.
Q. Was that notice so that you could tell what color of a pencil was used?
A. Yes, sir.

(By Juror GRANT:)

Q. How many days after the notice was written before you first saw it?
A. On the afternoon of the 8th; it was written on the 6th and I saw it on the afternoon of the 8th.

254 Counsel for the defendant, having no further evidence to offer, rested the case on behalf of the defense.
Counsel for the plaintiff offered the following evidence on behalf of the plaintiff in rebuttal:

255 PETER HALL, called on behalf of the plaintiff in rebuttal, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Mr. Hall, you heard the testimony of these gentlemen in reference to the conversation that took place at Pleasent camp after the return of Mr. Cahoon, in which he stated that he told you that he

instructed Mr. Lewis to make the upper locations that were pointed out on the map as number 11 and 12, with the explanation that he had made a temporary location upon these claims, and that he had instructed Lewis to locate you up the creek No. 11 and 12, and you agreed to that; state to the jury if at that time any such conversation took place.

A. No, sir.

Q. When Mr. Cahoon came up there at that time, what were you boys doing?

A. Working at the new store building; I was working inside putting in a window frame.

Q. Where were the other boys working?

A. Chisholm was working outside.

Q. When you had this conversation about this matter, where did that take place?

Counsel for the defendant objected to the above question for the reason that the same is part of the original case and not proper rebuttal.

256 Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

A. It took place outside of the building.

Q. Who was inside of the building at that time?

A. Hawes and Al Lowe were inside of the building.

Q. What were they doing?

A. Scraping bacon.

Q. Down at Camp Sunshine you heard the testimony of these gentlemen there that you told Mr. Cahoon and also you told Mr. Hawes and others that Mr. Chisholm was so conscientious that he couldn't swear to his location, and that you instructed Mr. Cahoon that it would be all right for Cahoon to go back and make the two locations upon Porcupine marked 11 and 12; state if any such a conversation took place.

A. No, sir.

Q. There or at any other time?

A. No, sir.

Q. Now, Mr. Hall, you heard them testify to the fact. Do you know that you don't have to swear to a location?

Counsel for the plaintiff objected to the above question for the reason that the same is not proper and no witness has testified that a location notice had been sworn to, and that the same is immaterial. Objection sustained by the court.

Q. You testified that no such conversation took place?

A. No, sir.

Q. Mr. Hall, they also testify about yous testifying up
257 above that you didn't know what Cahoon and Lewis went back for. Did you hear that testimony?

A. Yes, sir.

Q. The testimony that you gave on you- former examination was the same testimony that you give now, is it not?

Counsel for the plaintiff objected to the above question for the reason that the same is leading and incompetent.

By the COURT: The objection is sustained on the ground that it is leading.

Q. State what you testified to up there.

A. It was the same.

Counsel for the defendant objected to all of the foregoing testimony and asked the court that the same be stricken out for the reason that the same is not rebuttal testimony.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Cross-examination by Judge WINN:

Q. Wasn't the last question I asked you on the witness stand the question written out on this piece of paper, and isn't that your answer to it? "You were there when all the conversation and agreement about going back took place, and you don't know why they went back; that is it, is it, Mr. Hall?" Answer. "It seems
258 so, sir." Isn't that the very question put to you on the witness stand at Skaguay, Alaska, upon the trial of this case, and when you said it seemed you didn't know what they went back there for I dismissed you from the witness stand?

A. I think that is the question.

Q. And you think that is the answer?

A. Yes, sir.

Q. When you were on the witness stand here you testified they went back up there to rectify the staking; some one had overstaked the claim?

A. Yes, sir.

Q. Now you do know, do you?

A. I would like to explain that. You asked me the question in Skaguay just before that if I told you what I knew, and I suppose you wanted to know what I understood about it.

Q. Didn't I just ask you before this a half a dozen questions as to what they went back there for, and also incorporated in it that you were there and heard all the conversation, and then I asked you the question and you didn't know what they went back for?

Counsel for the plaintiff objected to the above question for the reason that the same is unintelligable to the witness.

Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Didn't I ask you several questions before, and in each
259 of these questions I was trying to find out whether or not you knew what Cahoon went back for, and to each one of these questions you answered the same thing, that you didn't know for what purpose they went back for, after having this conversation in your presence?

By the COURT: If the witness can remember them.

Counsel for the defendant duly excepted to the remarks of the court.

A. No; I can't remember it.
Q. It is a material fact you don't remember?
A. You asked me that question half a hundred times.
Q. And you *always told* me you didn't know?
A. I can't remember what I said.
Q. If you did testify, what did you state at Skaguay these boys were going back for?
A. To rectify the staking.
Q. You testified that at Skaguay, did you?
A. I think I did.

Redirect examination:

Q. On what claims?
A. On the original claims.

260 WILLIAM CHISHOLM, called on behalf of the defendant in rebuttal, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Mr. Chisholm, you heard the testimony of these witnesses in reference to the conversation that took place at Pleasent camp after the return to Cahoon from Porcupine, in which they stated that Mr. Hawes being present that he told you and Hall that he had made a temporary location of two claims for you, but had afterwards instructed Mr. Lewis to restake you further up the creek; state to the jury if that is true.

Counsel for the defendant objected to the above question for the reason that the same does not incorporate the facts and it is not proper rebuttal.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

A. That is not true.

Q. State if afterwards at Camp Sunshine you heard the testimony of Mr. Cahoon about Hall instructing him in your presence and acknowledging in your presence and that you agreed to the change of your claims and even sent him back there for that purpose; state if you ever authorized him then or at any time to change the location and restake you above,

A. Never at any time.

(No cross-examination.)

261 JAMES HANSON, called on behalf of the plaintiff in rebuttal, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. You heard Mr. Cahoon — Mr. Hawes testify yesterday, did you?

A. Yes, sir.

Q. You heard them make the statement that after you and Mr. Cahoon and Sutherland returned to Pleasant camp that in your presence up there that Mr. Cahoon stated to Mr. Hall and Mr. Chisholm that he had made a temporary location down at McKinley creek, and afterwards he had instructed Mr. Lewis to make other locations up above, and Mr. Hall and Mr. Chisholm agreed to it and ratified it at that time. State if any such a conversation took place in your presence.

A. I didn't hear anything of that kind at all.

Q. You have already detailed on the witness stand what conversation you did hear?

A. Yes, sir; I think I have.

Q. You were afterwards down at Sunshine?

A. Yes, sir.

Q. Did you hear any conversation there in which Hall sent Lewis and Cahoon back for the purpose of restaking the upper claims at any time?

A. No, sir.

(No cross-examination.)

262 DANIEL SUTHERLAND, called on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Were you present when these gentlemen testified yesterday?

A. Yes, sir.

Q. You heard their testimony in regard to a conversation that took place at Pleasant camp after you, Cahoon, and Hanson returned in which Mr. Cahoon stated Mr. Hawes' claiming that he was present and he told them about making a temporary location, and that he had changed the location, and they agreed to it. State if you heard any such a conversation of that kind.

A. No, sir; I never did. I never heard a word said about a temporary location until they came to court.

Q. State where, if you remember, *where* this conversation took place when you got back, whether inside or outside.

A. Outside.

Q. You know Al. Lowe?

A. Yes, sir.

Q. Was he there at that time?

A. He was.

Q. You heard about the conversation that took place at Camp Sunshine?

A. Yes, sir.

Q. Did Hall instruct Lewis and Cahoon to go back and retake these upper claims?

263 A. He never did. I heard the last conversation they had.

Q. You heard them testify about a conversation about you being disgusted with Chisholm and Hall; you heard these witnesses testify that you said you was disgusted with the way Chisholm and Hall were acting. State if that is true.

A. It is untrue.

(No cross-examination.)

264 AL. LOWE, called on behalf of the plaintiff in rebuttal, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. MALONY:

Q. Are you interested in these claims here in controversy

A. No, sir.

Q. You have got nothing in this, good, bad, or indifferent?

A. No, sir.

Q. You know these parties, do you, Chisholm, Hall, Cahoon, and Hawes?

A. Yes, sir.

Q. W-ere were you along about the 5th or 6th day of October, '98, of last year?

A. Pleasent camp.

Q. Were Cahoon, Hall, Chisholm, Hanson, Sutherland, and those boys up there?

A. Yes, sir.

Q. About what date was it when you got to Pleasent camp?

A. The fourth, I believe.

Q. From what place?

A. From Pyramid Harbor.

Q. Who was up there when you came?

A. Hall and Chisholm and a gentleman by the name of Hawes.

Q. Were you there when Cahoon returned from Porcupine creek?

A. Yes, sir.

Q. Do you remember about the date of his return?

A. I think it was the fourth or fifth; no; it was later than that.

265 Q. Do you remember of his return?

A. I remember of the return, but I don't recollect the date.

Q. Where were you at that time?

A. In the store building, handling some bacon.

Q. Who was helping you, if anybody?

A. Mr. Hawes.

Q. How long did you remain in that building there the date of Cahoon's return?

A. Until about 11 o'clock, until I went out to get dinner.

Q. During the time you were in there after Cahoon's return did you go out before you went to get dinner for the boys?

A. No, sir.

Q. Do you know of any conversation that took place inside of that building at that time?

A. Not anything particular.

Q. That is, with Cahoon, Chisholm, and Hall?

Counsel for the defendant objected to the above question and all of the foregoing testimony for the reason that the same is not proper rebuttal.

Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Did you remain there until dinner time?

A. Yes, sir.

Q. To your knowledge no conversation between Chisholm, Hall, and Cahoon took place there?

A. Nothing, only passing the time of day.

Q. Where was Chisholm and the rest of the boys working?

A. Hall was working on a window and Chisholm was work-
266 ing on the kitchen; whether he was inside or outside I don't know.

Cross-examination by Judge WINN:

Q. How many rooms are there?

A. Two.

Q. Were you in both rooms at one time?

A. No, sir.

Q. They would have met in the other room and you not know anything about it?

A. There is an open door between the rooms.

Q. You are the same man that has been working for Dalton for six or seven years?

A. I was working for him for about three years.

Q. You are still engaged in business with Dalton?

A. No, sir.

Q. How long since?

A. This fall.

Q. You are not connected in business with him at all?

A. No, sir.

Q. Own in any claims with him?

A. No, sir.

Q. Stores or trail or any other business?

A. No, sir; I am interested with Mr. Dalton in a mining claim.

Q. Now, Mr. Lowe, what time did you say Cahoon returned that morning?

A. I guess about nine o'clock; most likely between eight and nine o'clock. I don't recollect.

267 Q. You don't know of any conversation that took place with Cahooh at all that forenoon?

A. No, sir; not among the rest of the boys.
Q. You were in that room scraping bacon from what time?
A. I should judge about 7 o'clock until about 11.
Q. Are you sure of that now?
A. Yes, sir.
Q. You never left the room from 7 until 11?
A. I might have stepped outside a minute.
Q. It might have been possible that you stepped in the other room?
A. No, sir; if I went out at all, it was over to the tent. I wasn't in the kitchen part at all.
Q. Is there a window in the kitchen?
A. Yes, sir; two windows.
Q. How are these windows located with reference to the door? If you were looking in the door, could you see the windows in the house adjoining the room you were scraping bacon in, and if that conversation was had standing by the windows could you have seen them?
A. If I looked through the door.
Q. If standing alongside of the windows—if you look out from the room you were in into the kitchen, could you see the windows unless you were standing in the door?
A. No, sir.
Q. Then if some one had been in the kitchen standing over by the windows you couldn't have seen them unless you was standing in the door?
268 A. If I was anywhere near the center of the building. The door is right on one side of the building, and if I was over on that side I could.
Q. You was not particularly looking?
A. It was none of my business.
Q. Did you know they had gone down to prospect?
A. Yes, sir; I knew they were down there prospecting.
Q. When people come out from prospecting they don't stand on the housetops and proclaim everything?
A. No, sir.

Redirect examination:

Q. How big is that building up there?
A. I guess twenty-five feet wide and about forty feet long.

Recross-examination:

Q. A prett- good size building.
A. I wouldn't swear to it. It is a pretty good size building.

There being no further evidence to offer on either side, the case was closed.

269 Counsel for the defendant moves the court to instruct the jury to return a verdict for the defendant for the reason that the plaintiff in this case has utterly and completely failed to prove the material allegation of the complaint, and it conclusively appears

from the testimony that McConaghy and Hackley are the only qualified persons to hold the two claims in controversy, and it is conclusively proven that Hackley and McConaghy were the original discoverers of gold upon the claims, and that there is not a syllable or word of testimony that either — or Hall or their agent, Cahoon, ever discovered any gold on either one of the claims; that Hackley was upon this claim at all times from the time he made the discovery until the location was made; that Hall and Chisholm have not proven themselves to be citizens of the United States, and that there is no evidence here to sustain a verdict in this case on behalf of the plaintiff should the jury return one.

Motion denied by the court; to which ruling counsel for the defendant then and there duly excepted.

270 *Charge of the Court to the Jury.*

GENTLEMEN OF THE JURY: Both the plaintiff and the defendant have asked for certain instructions; part of these I will give you, and such as I read I give you as the law of this case, and the defendant having clearly stated the issues to be tried, I will read the instructions asked by the defendant first:

"This is an action brought on the part of the plaintiff, a mining copartnership, consisting of the following-named persons, to wit, John Dalton, William Chisholm, Peter Hall, James Hanson, and Dan. Sutherland, against the McKinley Creek Mining Company, a mining copartnership, consisting of the following-named partners, to wit, Edwin Hackley, Alex. McConaghy, C. G. Lewis, Carl A. West, C. P. Leitch, C. P. Cahoon, Bert Woodin, and William Hawes, for the purpose of determining which of said two companies is the owner and entitled to the possession of two certain mining claims set out and described in the petition of plaintiff.

"The two claims in controversy have been referred to as the McConaghy claim, which has also been claimed by Peter Hall, and the Hackley claim, which is claimed by William Chisholm."

"The issues for you to pass upon in this case are few. The partnership of each company is admitted and the plaintiff company declares that it is in possession of the two claims and is the owner of the same by reason of prior location, occupation, and discovery of precious metals and in compliance with the laws of the United
271 States and the local rules and regulations of the Porcupine mining district, and declares while it was in such possession and the owner that the defendant company on or about the 10th day of June, 1899, entered upon and by force and arms attempted to oust the plaintiff of possession."

"The defendant company claims that it is the owner by reason of some of its members having been the prior locators and discoverers of precious metals and in compliance with the laws of the United States and the local rules and regulations of the Porcupine mining district, and the plaintiff company has wrongfully and unlawfully and against the will and consent of the defendant company taken possession of the same."

"I instruct you that the burden of proof in this case is upon the plaintiff to establish by the preponderance of the evidence—that is, the greater weight of evidence—the following facts in order to recover:

"1. That the plaintiff company, or some of its members, were the first and the original locators, and, by exploration and discovery of precious metals and in compliance with the local rules and regulations of the Porcupine mining district and the laws of the United States, located and took up the two claims in controversy.

"2. I also instruct you that under the paper which has been offered in evidence in this case that C. P. Cahoon was constituted the agent of Peter Hall, William Chisholm, and William Hawes to locate mines in the district of Alaska, and that anything done by the said Cahoon for either the said Hall, Chisholm, or Hawes in
272 the way of locating mines would be binding upon Hall, Chisholm, or Hawes, just the same as though they had been the actual acts of either of the said last-mentioned parties, and any conversation had with the said C. P. Cahoon relative to the location, staking out, and taking up of said claims, or a claim for either of the said parties, would be binding upon the party the same as if it was his own conversation; but a location made by an agent cannot be abandoned or surrendered except by consent of the principal given either before or after abandonment."

"I further instruct you, if you should find in this case that the two claims which are in controversy were actually staked out by Cahoon for Chisholm and Hall and at the time intended as permanent locations, but that afterwards the said Cahoon made a change of location for these parties or either of them, and such relocation and restaking of claims on this same creek by the said Cahoon was ratified by the said Hall and Chisholm or either of them or consented or agreed to by them, then such change of location would be binding upon such plaintiff as so agreed, consented to, or ratified the same, and such agreement thereto or ratification thereof would be an abandonment of the first location made by Cahoon for said parties or either of them and would leave the first location open for occupancy and taking up by Hackley and McConaghy, either of them, or any one else."

"Gentlemen, you are the sole judges of the evidence and credibility of the witnesses and the weight to be attached to the evidence of each witness who has testified before you. You have a
273 right to take into consideration the manner in which the witness testifies, his demeanor upon the witness stand, and all the circumstances surrounding his story, and then say upon which side the greater weight is and if the evidence equally balances. It is your duty to find in favor of the defendant. The plaintiff has to make out a case by the preponderance of the evidence."

"There are several ways of impeaching a witness, gentlemen of the jury, and one of the manners in so doing is to show that a witness on some previous trial swore to a material facts in a different way than he did on a subsequent trial, and if you find that any witness who is testifying before you has willfully testified falsely to some material fact upon this trial, then you have a right, if you so choose,

to disregard the entire testimony of said witness unless the same be corroborated by other creditable evidence in the case."

On behalf of the plaintiff I give you these instructions:

"Gentlemen of the jury, you are instructed that on the 6th day of October the ground in controversy in this suit belonged to the United States and was open to location as mining claims. You are further instructed that there is no such thing in law as a temporary location for mining claims, and if you find and believe from the evidence that on the 6th day of October, 1898, C. P. Cahoon, acting under the power of attorney introduced in evidence before you, located the ground in controversy for Peter Hall and William Chisholm, that such location was an appropriation of such ground and gave the said Hall and Chisholm title to it.

"You are further instructed that if under the above instructions you find the ground in controversy was located and the title
274 acquired by Peter Hall or William Chisholm, such title could only be lost under the facts of this case by an abandonment, and if you find and believe from the evidence that the said Peter Hall or William Chisholm did not abandon the claims in controversy and did not ratify any attempted abandonment of them by Cahoon, you will find for the plaintiff.

"You are further instructed that when land has once been located as a mining claim any other location of it made subsequently thereto, while the first location is in full force and effect, is void, and if you find and believe from the evidence that there was any abandonment of the ground in controversy by Peter Hall or William Chisholm, but such abandonment was made after the locations of Hackley and McConaghy, under which defendants claim, under date of October 8th, 1898, then the locations of William McConaghy and Hackley were void, and there is evidence before you that Peter Hall and William Chisholm once again went upon the ground and restaked it and replaced their notices on or about the 20th day of October, 1898.

"The instructions I have read you cover the law features of this case pretty completely. The question of the citizenship of the plaintiff has been raised by counsel in their argument, and I charge you that the citizenship of either the plaintiff or the defendant in this case is not an issue of fact to be determined by you at all. It is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States; the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man
275 against another cannot question the citizenship of either. If you apply for a patent the United States has the right to question the citizenship, because the purpose is to get a title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens, that could only be taken advantage of by the Federal Government.

"Now, much has been said by counsel as to a preliminary location and as to the time a man has to explore his premises before another man has a right to locate, because it is contended on one *said* that

Hackley was the discoverer, and on the other side that Sutherland was, and on that point of discovery I instruct you that any of these persons, if they say or extracted or failed to extract, but saw being extracted any precious metals, it is a sufficient discovery to authorize him or them to make a location; so I say any of these persons, if they saw gold taken from the ground, that they are discoverers in the sence that authorizes a man to locate.

"Now, just a word as to the time a man has after discovery before eh must take steps to locate: It must be a reasonable time; a man cannot discover gold in one place and hold the whole world at bay while he explores the whole creek; he must act promptly; it is the policy of the law to allow to the thrifty the benefit of their energy, and it is often the experience that the discoveror does not get the best claims; he must make up his mind within a reasonable time, and it is a question of fact for the jury, and he is not permitted to hold the *hold* district until such time as he may determine which claim he desires to locate.

276 "The question of abandonment is a question of fact to be determined by the jury from all the surroundings and circumstances. It is a question of intent, and it is incumbent upon the jury to determine from the fact- in the case, if you find that the location was made for Chisholm and Hall, as to whether or not it was in their minds to relinquish, abandon, and give up the claims alleged to have been located, and Cahoon himself as agent could not abandon for them. They must do that. After he made a location his agency was at an end. He had nothing further whatever to do with it, and you must determine if you find a location was made by him and it was prior to the other locations whether Chisholm and Hall at any time subsequent to the location did abandon and give up what location they had acquired, because if they did they ratified and confirmed the further acts of their agent, which he was not authorized to do, but which he might do if they afterwards confirmed, ratified, and consented to it."

277 The following are the pleadings in this case:

Bill of Complaint.

In the District Court of the United States in and for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant. } (In Equity.)

To the Honorable Charles S. Johnson, judge of said court:

Peter Hall, William A. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, partners under the firm name and style of the Alaska United Mining Company, bring this their bill of complaint against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and C. P. Cahoon, part-

ners under the firm name of the McKinley Creek Mining Company, and show to the court that the said parties, both plaintiffs and defendants, are citizens of the United States and residents of the District of Alaska, and thereupon your orators complain and say:

I.

That heretofore, to wit, on or about the 10th day of June, A. D. 1899, your orators were the owners by location, exploration, and discovery of precious metals, and a compliance with the local rules and regulations of the Porcupine mining district, of the following placer mining claims, to wit: Situated on McKinley creek and tributary to the Porcupine river, in the district of Alaska, being about 1,200 feet above *above* the confluence of the said McKinley creek with the said Porcupine river, and bounded and described as follows: Beginning at the location post, about 1,800 feet above the first falls of McKinley creek, upon which stake or post the location notice is posted, thence in an easterly direction, at right angles to the course of the creek, 300 feet; thence down the creek 1,500 feet, 300 feet from the center thereof, and following its meanders to the corner stake; thence 300 feet to the center of McKinley creek, at a point about 600 feet above the first falls on said creek, stake on bank of creek for the lower post of the claim; continuing at right angles to the creek, crossing the same 300 feet to corner; thence 1,500 ft. to the place of beginning, following the meanders of McKinley creek and 300 feet therefrom; said claim being the one located by the plaintiff Chisholm on the 6th day of October, 1898, and witnessed by the defendants D. Sutherland and James Hansen; also the following-described placer claim: Beginning at the same post as the beginning post of the last-described claim, upon which the location notice for this claim is also posted, thence in an easterly direction at right angles to the creek 300 feet to the corner identical with the corner of the Chisholm claim; thence up the creek, following its meanders and 300 feet from the center thereof, 1,500 feet to corner; thence 300 feet to center of McKinley creek to stake on bank of creek for upper post of the claim; thence continuing crossing said creek 300 feet to the corner; thence down the creek 1,500 feet, following the meander of the creek and 300 feet from the center thereof, to the place of beginning; said claim being the one located by the plaintiff Peter Hall on the 6th day of October, 1898, and witnessed by the defendants J. Hansen and D. Sutherland.

278 Your orators further show that since their acquisition of said claims they have made extensive and valuable improvements thereon, to wit, they have at great labor and expense cut a trail so as to make said claims accessable; they have prospected and opened up same and demonstrated that they are very rich in placer gold; they have bought and carried in and now have on the ground on said claims about 6,000 feet of lumber for the construction and erection of sluice boxes for the profitable working of said claims; that they have expended on said claims in all the sum of at least $2,600.00, and on said 10th day of June, 1899, being so quietly and peaceably in the possession thereof, were busily engaged in the work

of building said sluice boxes, opening up the claims, preparatory to the extraction of gold therefrom during the present season for mining operations.

II.

That on the date last aforesaid the defendants acting or claiming to act together as partners and setting up some sort of an adverse claim and title to said land, forcibly entered upon said ground and attempted to drive your orators therefrom by threats of force and violence for the avowed purpose of themselves extracting gold during the present season from the gravel banks and bars on said claims, and are now threatening by superior physical force and a breach of the peace, if necessary, to forcibly take said property from your orators, and work the same for the placer gold therein, or at least wholly prevent your orators from working and developing the same during the present season, and your orators fear, and so charge the fact to be, that unless restrained by this honorable court they will proceed to the execution of said threats.

Your orators further show that said defendants nor any of them are pecuniarily responsible for any damage they may inflict upon your orators, and would be wholly unable to respond in damages for such injury; that if they should be allowed to work and develop said claims and forcibly take same from possession of your orators and appropriate the gold extracted to their own use, your orators would be wholly without any remedy at law for the damages sustained by reason thereof.

Your orators further show that if the defendants should prevent them from putting in their sluice boxes and opening up said claims during the present season the lumber now on the ground and of the value of about $1,200 would be largely, if not completely, lost to your orators, and they would lose besides the whole of the season's output of gold from said claims, and that every day they are so prevented from pursuing their work of opening up and developing said claims is a great and irreparable injury to them by reason of the shortness of the season in said district and the necessity for pushing the developing work to the utmost while the season permits, for all of which wrongs and injuries your orators have no complete, speedy, and adequate remedy at law.

Wherefore your orators pray for process, and that the defendants and each of them, their agents, attorneys, and employés, be enjoined and restrained from working or attempting to work said placer mines or any part thereof, or from interfering with or hindering your orators in their possession, use, and occupancy thereof, and especially with opening up, developing, and working the same; that defendants be required to set forth the nature of their claim; that upon a hearing your orators be quieted in the title and possession of said claims, it be declared valid, and *and* for costs of suit and for general relief.

MALONY & COBB,
Solicitors for Plaintiffs.

279 UNITED STATES OF AMERICA, } ss:
District of Alaska, }

I, Peter Hall, being first duly sworn, depose and say: I am one of the plaintiffs mentioned in the above and foregoing bill of complaint, and the matters and things in said bill of complaint alleged are true in point of fact where the allegations are positive, and where alleged upon information and belief I believe them to be true.

PETER HALL.

Subscribed and sworn to before me this 15th day of June, A. D. 1899.

ALBERT D. ELLIOT, *Clerk.* [SEAL.]

(Endorsed:) "Filed June 16th, 1899. Albert D. Elliot, clerk."

Answer.

In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff, }
vs. } Answer.
THE MCKINLEY CREEK MINING COMPANY, Defendant. }

Comes now the above-named defendant, The McKinley Creek Mining Company, a mining copartnership consisting of the following members and partners, to wit, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, and, for answer to the bill of complaint on file herein, says:

I.

That defendants admit that all of defendants are citizens of the United States of America and residents of the district of Alaska, and are partners in a mining copartnership under the name and style of the McKinley Creek Mining Company; admit that the complainants Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland are partners under the firm name and style of the Alaska United Mining Company; but as to said complainants or any of them being citizens of the United States these defendants have not sufficient knowledge to form a belief, and therefore deny that plaintiffs or any of them are citizens of the United States.

II.

Deny that on or about the 10th day of June, 1899, or at any other time or times, the complainants or any one or more of them were the owners, by location or otherwise or by exploration or by discovery, of precious metals or any metals or by a compliance with the local rules or regulations of the Porcupine mining district or any rules or regulations or laws or customs, or that the plaintiffs or any of them are now or ever have been the owners of or entitled to the possession of the two placer mining claims described in the bill of com-

plaint herein or to any part of the same or either of them, or that either of said claims was located by complainant Chisholm on the 6th day of October, 1898, or at any other time, or that said Chisholm ever attempted to locate said claims, except as hereinafter stated, or that either of said claims was located by complainant Peter Hall on the 6th day of October, 1898, or at any other time, or that said Hall ever attempted to locate said claim, except as hereinafter stated.

280 Deny that said complainants or any of them ever acquired said claims or either of them or any part of the same, or that they have ever occupied any part of the same except as hereinafter stated, or that they have made extensive or valuable improvements thereon or any improvements except as hereinafter stated, or that plaintiffs have, at great labor or expense or any labor or expense, cut a trail so as to make said claims accessible, other than that plaintiffs were employed at work on the trail leading up and along said creek for the purpose of making all the claims along said creek accessible, and especially those claims owned by some of plaintiffs further up said creek. Defendants admit that said claims are rich in placer gold, but deny that *that* complainants or any of them have ever prospected the same except as hereinafter stated. Deny that complainants have bought or carried in or now have upon the ground of said claims about 6,000 feet of lumber, or any other amount of lumber more than about 400 feet, and said 400 feet of lumber or thereabouts is upon one of said claims only. Deny that said complainants or any of them have expended on said claim or claims, in all, the sum of at least $2,600.00 or any other sum or amount to exceed $—, or that any work yet done by complainants or any of them has been of any benefit whatsoever to said claims or to their true and legal owners, which said owners are these defendants, or that on the 10th day of June, 1899, or at any other time complainants were quietly or peaceably in the possession of said mining claims or any part thereof, or were engaged in the work of building sluice boxes or opening up said claims preparatory to the extraction of gold therefrom, or in any other possession or doing any work at all except as hereinafter stated.

II.

Defendants deny that on the date last aforesaid or any other date the defendants, acting or claiming to act together as partners, or well knowing or knowing at all that they had no right, claim, or excuse for so doing, forcibly entered upon said ground or attempted to drive complainants or any of them therefrom by threats of force, any violence, or any threats at all, for the avowed purpose of themselves extracting the gold from the gravel banks and bars on said claims during the present season or for any purpose or purposes, or that defendants or any of them are now threatening, by a superior physical force or any force or any breach of the peace, to forcibly or otherwise take said property from the complainant- or to work the same for placer gold therein or to wholly prevent or to in anywise prevent the complainants from working or developing the same dur-

ing the present season, or that, unless restrained by this honorable court, the defendants or any of them will proceed to the execution of threats or that defendants or any of them have made any threats.

Defendants deny that they are not pecuniarily responsible for any damages they may inflict upon the complainants, or would be wholly unable or unable at all to respond in any manner in damages for such or any injury to complainants, or that if they should be allowed to work and develope said claims or forcibly or otherwise take same from the possession of the complainants or appropriate the gold extracted to their own use that the complainants would be wholly without any remedy at law or at all without any remedy at law for any and all damages sustained by reason thereof.

Defendants admit that the season for working said claims is short, but deny that if complainants are prevented from working
281 said claims and putting in sluice boxes during the present season the lumber now on the ground or any of the same would be largely or completely or in any manner lost to the complainants; and deny that every day complainants or any of them are prevented from working said claim or claims is a great or irreparable or any injury to the complainants or any of them, or that complainants have no complete or speedy or adequate remedy at law for any wrongs or injuries of these defendants.

And as new matter, by way of a cross-complaint in — against the Alaska United Mining Company, the defendant, The McKinley Creek Mining Company, alleges:

I.

That on or about the 6th day of October, 1898, one C. P. Cahoon entered upon that certain described placer mining claim referred to in the bill of complaint herein as the lower or first of said two placer mining claims described therein, situated on McKinley creek, in the district of Alaska, and the one claim- in said bill of complaint to have been located by William Chisholm, the said C. P. Cahoon having at the time a pretended power of attorney from said Wm. Chisholm to locate for him placer mining claims in the district of Alaska; that prior to said time, to wit, on the 5th day of October, 1898, one Edwin Hackley, the discoverer and namer of said McKinley creek, had entered upon said placer mining claim and was exploring and prospecting the same, and had at that time discovered thereon precious metal, to wit, gold, and the said Hackley at the time of the entrance of the said Cahoon upon said placer mining claim informed the said Cahoon that he, the said Hackley, intended to occupy the said placer mining claim, in compliance with the laws of the United States and the local rules and regulations providing that upon thorough investigation and exploration the said Hackley discovered gold and precious metals in sufficient quan-ity to warrant location and continued occupancy of said placer claim, and the said Cahoon made only temporary location of said mining claim in the name of said Wm. Chisholm, with the full understanding that if the said Hackley upon said investigation and exploration concluded to locate and occupy said claim that the said Cahoon would vacate the

same, and would permanently stake out and locate another claim for the said Chisholm further up said McKinley creek, in said district of Alaska.

That in pursuance of said understanding and agreement by and between the said Cahoon and Hackley the said Hackley continued his exploration for gold and precious metal upon said land, and that upon the 8th day of October, 1898, the said Hackley and one Alex. McConaghy permanently staked, located, and occupied said mining claims for the said Hackley, the said Hackley having in the meantime discovered gold upon said claim and such good indications as to determine him to occupy and hold the same under the laws of the United States governing placer mines, and so informed the said Cahoon, and the said Hackley was the original and first discoverer of precious metal upon said claim.

II.

That on or about the 6th day of October, 1898, the said Cahoon, under and by virtue of a pretended power of attorney from one Peter Hall, entered upon the upper or second claim referred to in said bill of complaint and in controversy, on McKinley creek, district of Alaska, and partially staked out said claim for said Peter Hall, but that on the 8th day of said month one Alex. McConaghy entered upon said claim and staked over the same ground claimed by
282 the said Peter Hall, and the said McConaghy has ever since said time been the owner and in the possession of said claim, holding the same in compliance with the laws of the United States governing placer mines and the local rules and regulations of said district, and the said McConaghy was the first and original discoverer of precious metal, to wit, gold, upon said placer claim.

That immediately thereafter the said C. P. Cahoon, in consideration of the understanding and agreement theretofore had by and between the said Cahoon and Hackley, abandoned the placer claim located by the said Hackley, and also, to avoid trouble and save the said Peter Hall of a conflicting claim with the said Alex. McConaghy, and knowing that the ground still on up the said McKinley creek, from all indications, was as rich in precious metal as the two said claims in controversy, the said Cahoon caused to be located two other claims, one for the said Peter Hall and one for the said William Chisholm, in lieu of the two first claims located and hereinbefore referred to.

III.

That on or about the 11th day of October, 1898, the said Cahoon reported his doings to the said Hall and Chisholm, and the said Hall and Chisholm were satisfied and acquiesced in and ratified the doings of the said Cahoon, with the exception that some dispute arose as to whether or not the said Cahoon had personally located, staked out, and explored the two last named substituted and lieu claims of the said Hall and Chisholm; and in so much as the said Cahoon had not personally so done, it was understood and agreed by and between the said Hall, Chisholm, and Cahoon that the said Cahoon was to

return to said locations and personally restake the two substituted and lieu claims, one for the said Hall and the other for the said Chisholm; and accordingly and agreeably to said understanding and agreement, the said Cahoon did return to said placer mining claims and restaked and located the two substituted and lieu claims for the said Hall and Chisholm on or about the 14th day of October, 1898, and the said Hall and Chisholm accepted said claims and fully ratified and acquiesced in the doings of the said Cahoon until on or about the 20th day of May, 1899, and while the said Hackley and McConaghy were in the quiet and peaceable occupation and possession of their respective claims, being the two in controversy, and working upon the same, and after the said Hackley and McConaghy had made extended improvements upon said claims and had delivered thereon some 1,200 feet of lumber for the purpose of making sluice boxes for the working and operation of the same, the said Hall and Chisholm, acting together and being assisted and abetted by John Dalton, Dan. Sutherland, and James Hansen, claiming to be the Alaska United Mining Company, well knowing that they had no right, claim, or interest in or to said premises, did forcibly enter upon said ground and forcibly and by threats and violence take possession of said two claims in controversy, and by superior force and against the will and consent of said Hackley and McConaghy have ever since said time occupied a portion of said claims and ground & excluded the said Hackley and McConaghy from said claims, and are now preparing and intending to extract gold and precious metal fromsaid ground, to the exclusion and irreparable damage and injury of said McConaghy and Hackley, and to the irreparable damage and injury of the defendants, The McKinley Creek Mining Company, by reason of the facts hereinafter stated.

283 IV.

That afterwards, to wit, on the 29th day of May, 1899, the said Hackley and McConaghy, by good and sufficient conveyance, transferred all their right, title, and interest in and to said claims to the McKinley Creek Mining Company, a mining copartnership, of which the said Hackley and McConaghy are members, together with the other parties mentioned herein, and that said McKinley Creek Mining Company is now the owner and entitled to the peaceable and undisturbed possession of the two said mining claims in controversy; but that the Alaska United Mining Company, of which the said Hall and Chisholm are members, still unlawfully and forcibly and against the will and consent of the said defendant maintains possession of said claims to the exclusion of the said defendant and prevents the said defendant, The McKinley Creek Mining Company, from working and operating the said claims, and unless the said plaintiff and its individual members are restrained will extract all of the precious metal from said claim, and are preparing so to do, to the great & irreparable damage and injury of the said defendant and its individual members.

V.

That neither the plaintiff nor all or any of the members of said copartnership are pecuniarily responsible for the damages which they may inflict upon said defendant, and are wholly unable to respond in damages for the injury which they will cause the said defendant should it or they be allowed by force and violence to hold the possession of said claims and extract the gold therefrom, and the said defendant company is wholly without any remedy at law for the damages that would be sustained unless the said plaintiff company and its members are restrained from committing the acts herein complained of.

And that by reason of the facts herein stated these defendants and the defendant company have at all times herein mentioned and at all the times mentioned in the bill of complaint in said cause, then and now, have been the owners of said mining claims and each of them and in the possession of the same until ousted therefrom by the plaintiffs hereinbefore mentioned, but still are the owners and entitled to the possession of said claims and each of them as against the said plaintiffs or any one else, and the said defendants are under the law and practice of this court entitled to a jury trial for the trial of the title to said claims and each of them, and to that end and purpose have commenced in this honorable court a suit in ejectment for the trial and determination of the title to said property in an action at law and according to the usage and practice of this court, and until the trial and determination of such trial at law by this honorable court the defendants are entitled to a restraining order against said plaintiff company and its individual members restraining them and each of them from the commission of the wrongful acts herein complained of.

Wherefore defendants pray:

I.

That the said plaintiffs and each of them go hence without any relief.

II.

That the said defendant company be granted a temporary injunction or restraining order against the said plaintiff company and its individual members until the trial and determination of the said action at law to determine the title to said property, restraining the said plaintiff and its individual members from in anywise
284 entering upon the said placer mining claims or either of them, or making any improvements thereon, or working the same, or extracting gold or any other precious metal therefrom, or from committing any waste upon said claims or either of them, and for such other and different relief as the defendants are entitled to in the premises.

JOHN R. WINN &
R. D. WELDON,
Solicitors for Defendants.

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

I, Alex. McConaghy, being first duly sworn, say that I am one of the defendants and a member of the defendant copartnership in the within-entitled cause; I have read the foregoing answer and cross-complaint, know the contents thereof, and the same is true as I verily believe.

ALEX. McCONAGHY.

Subscribed and sworn to before me this 21st day of June, 1899.

[SEAL.] R. D. WELDON,
Notary Public for Alaska.

A copy of the foregoing answer and cross-complaint in the within-entitled cause is accepted and service of the same hereby acknowledged this 21st day of June, 1899.

MALONY & COBB,
Attorneys for Plaintiff.

(Endorsed :) Filed June 22nd, 1899. Albert D. Elliot, clerk.

285 In the District Court of the United States in and for the District of Alaska.

THE ALASKA UNITED MINING COMPANY ET AL., Plaintiffs, }
vs.
THE MCKINLEY CREEK MINING COMPANY ET AL., Defendants. }

Reply.

The reply of the above-named plaintiffs to the answer and cross-complaint of the above-named defendants.

Now come the said plaintiffs and in reply to the affirmative matter set up in the said answer and the cross-complaint they allege:

I.

Referring to the first paragraph on page 5 of said answer, plaintiffs admit that on the 6th day of October said C. P. Cahoon, one of the defendants herein, entered upon the placer mining claim in controversy herein and located the same for and on behalf of plaintiff William Chisholm, but they deny that the power of attorney under which said location was made was a pretended one, and say that the same was regular and valid. They deny that prior to said time or at any other time Edwin Hackley was the discoverer and namer of McKinley creek, or that the said Hackley had at that time discovered precious metals therein.

They furthermore deny all the alleged conversations and alleged agreements and understandings between the said Cahoon and the said Hackley, but they allege the truth and fact to be that subsequent to the location and staking of the said claim by the said Chisholm said defendants or some of them, notwithstanding that

they had been paid a valuable consideration, to wit, certain supplies and provisions for the services rendered by them in assisting to stake and witnessing the location of said Chisholm and Hall upon the claims in controversy, attempted to jump said claims and relocate the same for the defendants or some of them for the benefit of all of said defendants.

II.

Referring to the II paragraph on page 6, six, of said answer and cross-complaint, plaintiffs admit that the said Cahoon on or about the 6th day of October, 1898, entered upon the second claim referred to in said bill of complaint, but they deny that it was by virtue of a pretended power of attorney from Peter Hall, and say that the same was made by a regular and valid power of attorney from the said Hall, and thereunder said Cahoon located and staked said claim for the plaintiff Peter Hall.

Plaintiffs have no information sufficient to be able to affirm or deny whether or not the said Alec McConaghy subsequently, on the 8th day of October, 1898, entered upon said claim and staked the same over the claim of the plaintiff Peter Hall or not, but they have no reason to doubt that such attempted jumping was done, but they deny that said McConaghy has ever since said time or has ever at any time been the owner and in the possession of the said claim, holding the same in compliance with the United States laws governing placer mines and the local rules and regulations of said district; and furthermore deny that the said McConaghy was the first discoverer of precious metals upon said claim.

And, referring to the last clause of said paragrap*g* II (2)
286 on page 7, plaintiffs say they have not sufficient information to be able to affirm or deny specifically whether or not the said Cahoon caused to be located two other claims upon said McKinley creek, as therein alleged, or not, but they say that if such locations were attempted that the *that the* same were without any authority from the said Peter Hall and Wm. Chisholm, and such locations have never been ratified by them, and they allege the truth and fact to be that after the said locations for the said Peter Hall and the said Chisholm on the said 6th day of October, 1898, the defendants, conspiring together with the said Cahoon and intending to cheat and swindle the said Peter Hall and Wm. Chisholm out of said claims, entered into some sort of an agreement, whereby they attempted to restake said grounds for the benefit of the defendants herein and to remove the location stakes and notices already on said ground.

III.

Referring to paragraph three (3) of said answer, plaintiffs deny that the said Hall and Chisholm were ever satisfied with or ratified the actions of the said Cahoon in attempting, in conjunction with the other defendants, to jump the claims in controversy.

They furthermore deny that there was any dispute as to whether or not the said Cahoon had staked, located, or explored the alleged substituted and lieu claims of the said Hall and Chisholm, but they

allege the truth and fact to be that the said Cahoon claimed authority under the said power of attorney from Peter Hall and William Chisholm to abandon the locations made for the said Hall and Chisholm thereunder, and that he had so abandoned the same, and alleged the ground in controversy to be relocated by the said Hackley and McConaghy for the benefit of the defendants herein, and the said Hall and Chisholm then and there repudiated said acts in so far as there was an attempted abandonment of said claims on their behalf.

Plaintiffs deny that there was any understanding or agreement that the said Cahoon should return to said placer mining claims and restake and relocate the alleged lieu claims for the said Hall and Chisholm, but as to whether or not they did return and stake such alleged claims, as in said answer set out, plaintiffs have not information sufficient to be able to either affirm or deny such allegations.

Plaintiffs deny that said Hall and Chisholm accepted the said claims mentioned in said answer as to the lieu or substituted claims or either ratified and acquiesced in the doings of the said Cahoon in attempting to jump the claims in controversy, and allege the truth and fact to be that they have at all times resisted, condemned, and repudiated such attempted jumping, and have at all times since the said 6th day of October, 1898, possessed and claimed the ground in controversy.

Plaintiffs furthermore deny that the said Hackley and McConaghy or the other defendants herein or either of them were ever in the quiet and peaceable occupation and possession of the mining claims in controversy herein, or that they ever worked upon the same, and they deny that the plaintiffs ever forcibly entered upon the said ground or made any threats of violence against the said Hackley and McConaghy, but they allege the truth and fact to be, being in the possession of the ground, as alleged in their bill of complaint, they ever resisted the efforts of the defendants to oust them therefrom until the matter could be presented and heard in this court.

287 IV.

Referring to the fourth (4) paragraph of said answer, on page 8 thereof, plaintiffs say that they have not sufficient knowledge or information to enable them to firmly deny whether or not the said Hackley and McConaghy have made a conveyance of the claims in controversy to the McKinley Creek Mining Company, but they have no reason to doubt that such is the fact, but they deny that the McKinley Creek Mining Company is the owner of said claims or entitled to the peaceable or undisturbed possession of the same. Plaintiffs admit that they, under the firm name of the Alaska United Mining Company, are now in the possession of the said ground, and are maintaining the same to the exclusion of the defendants, and say that it is true that, unless prevented, they will proceed to extract the placer gold from said claims as they have a legal right so to do.

V.

Plaintiffs deny that they are not pecuniarily responsible for any damages which they may inflict upon said defendants, and that they are unable to respond in damages to any injury which they may cause the defendants, and furthermore deny that the defendants will be in any manner injured or damaged by reason of the plaintiffs' occupation and working of said mines, for the reason hereinbefore set out, and, having answered said new matter fully, the plaintiffs pray as in their original complaint.

MALONY & COBB,
Solicitors for Plaintiffs.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Peter Hall, being duly sworn, depose and say: I am one of the plaintiffs in the above and foregoing action; the above and foregoing reply is true in point of fact.

PETER HALL.

Subscribed and sworn to before me this 22nd day of June, A. D. 1899.

J. G. PRICE,
Notary Public.

[SEAL.]

Service of the above and foregoing reply is hereby admitted as duly and legally made this 22 June, 1899.

JOHN R. WINN,
Solicitor for Defendants.

(Endorsed:) "Filed June 22nd, 1899. Albert D. Elliot, clerk."

288 That afterwards were filed the following exceptions to the instructions given and refused by the court:

In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff, }
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant. }

Exceptions to Instructions Given and Refused by the Court.

Comes now the above defendants, by their attorneys, John R. Winn and R. D. Weldon, and immediately after the retirement of the jury to deliberate upon their verdict in the above-entitled cause, and make the following exceptions, in writing, to the instructions given by the court to said jury upon said trial and to the refusal of the court to give such instructions offered by the defendants to the court to give said jury, which said instructions were offered at the proper time and at the close of the evidence in said cause and before the argument of counsel or the instructions to the jury by the court.

The following exceptions are made by the defendants, through their counsel, to the instructions given by the court to the said jury upon said trial:

I.

Defendants except to the modification made by the court of the second subdivision of the first instruction offered by the defendants and given by the court, which modification reads as follows: "But a location once made by an agent cannot be abandoned or surrendered except by consent of the principal given either before or after abandonment," for the reason that the said modification does not state fully the law upon the matter, which the court attempted to instruct the jury, and is given upon the theory that a permanent location was made by Cahoon, acting as agent for Hall and Chisholm, two of the plaintiffs herein, and said instruction is not justified by the evidence and is prejudice to the defendants.

II.

Defendants except to the first instruction given by the court on behalf of the plaintiffs, which reads as follows: "Gentlemen of the jury, you are instructed that on the 6th day of October, 1898, the ground in controversy in this suit belonged to the United States and was open to location; and you are further instructed that there is no such thing in law as a temporary location of mining claims, and if you find and believe from the evidence that on the 6th day of October, 1898, C. P. Cahoon, acting under the power of attorney, introduced in evidence before you, located the ground in controversy for Peter Hall and Wm. Chisholm, that such location was an appropriation of such ground and gave the said Hall and
289 Chisholm title to it," for the reason that said instruction is against the law and evidence of the case, for the reason that Hackley, one of the plaintiffs herein, was upon said claim upon the 5th day of October, 1898, and made a discovery of gold thereon, and was still prospecting the same upon the 6th day of said month and year for the purpose of locating and taking up the same, and that there is no evidence in the case to show that the said Cahoon legally or otherwise staked out and took up said claim on the 6th day of October, 1898, and that there is in law such a thing as a temporary or preliminary location of a mining claim.

III.

The defendants further except to the II instruction given to the jury upon request of the plaintiffs, which said instruction states substantially that if the ground in controversy was located and the title acquired by Peter Hall and Wm. Chisholm that it could only be surrendered by an abandonment or ratification of an abandonment, for the reason that the instruction is misleading to the jury, the court having at no time defined to the jury what constituted a good and legal location, so that the two plaintiffs could acquire title.

IV.

Objects to the III instruction given by the court at the request of the plaintiffs, which commences with the words "You are further instructed that when land has once been located, etc.," and ends with the words "about October, 1898," for the reason that said instruction is not justified by the evidence, and that the court in giving the same commented upon the facts of the case to the jury and indicated to the jury what had been established by the evidence in the case, which was an invasion of the right of the jury, to the prejudice of the defendants.

V.

Also objects to the instruction given by the court of its own accord, wherein he stated that it was not necessary for the plaintiffs to prove the citizenship of Chisholm or Hall, or either of them, and to the comments made by the court in said instruction, for the reason that the same is and was not justified by the evidence in the case.

VI.

Also excepts to the instruction given by the court wherein he states, "Now, much has been said also by counsel as to a preliminary location," and ends up with "They are discoverers in the sense that authorizes a man to locate," for the reason that said instruction does not state the law upon the matter therein stated.

VII.

Also excepts to the instruction given by the court that follows up the last above-mentioned instruction and commences with the words "Now, just a word as to the time a man, after discovery, before he must take steps to locate," and ends with the words "Until such time as he may determine which claim he desires to locate," for the reason that the evidence does not justify such instruction; that it would impress upon the jury that the court and judge thereof thought that McConaghy and Hackley, two of the defendants herein, were endeavoring "to hold the world at bay" while they explored McKinley creek, which said indication made by the court to the jury was not justified by the evidence, there being no proof of such fact; and if there is any proof of such fact, such comment upon the evidence was and is prejudicial to the interests of the defendants.

290 VIII.

Except to the last instruction given by the court for the reason that the same does not properly state the law upon the facts and matters therein contained, and for the further reason that the same is not justified by the evidence, in that the evidence did not show that Cahoon ever completed a location of any mining claim for Hall and Chisholm, especially the two mining claims in controversy, and that the agency on the part of Chisholm and Hall of said Cahoon never at any time during the facts brought out in the trial of said cause ceased.

And defendants except to the refusal of the court to give the jury the following instructions offered and tendered by the defendants, as aforesaid:

I.

The refusal of the court to give instruction No. III offered and tendered by the defendants.

II.

To the refusal of the court to give instruction No. IV so offered and tendered by the defendants.

III.

To the refusal of the court to give instruction No. V. so offered and tendered by the defendants.

IV.

To the refusal of the court to give instruction No. VII so offered and tendered by the defendants.

V.

To the refusal of the court to give instruction No. VIII so offered and tendered by the defendants.

VI.

To the refusal of the court to give instruction No. IX so offered and tendered by the defendants.

VII.

Excepts to the refusal of the court to give the instruction which counsel for the defendants offered, written in lead pencil, which was to the effect that it was encumbent upon the plaintiff to prove in this cause that the said Hall and Chisholm, two of the plaintiffs herein, were at the time they pretended to locate or take up the two claims in controversy *were* citizens of the United States.

JOHN R. WINN AND
R. D. WELDON,
Attorneys for Defendants.

The above and foregoing exceptions and each of them are hereby allowed.

CHARLES S. JOHNSON, *Judge.*

Endorsed: "Filed November 14th, 1899. Albert D. Elliot, clerk."

291 That afterwards the following affidavit of value was filed:

In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant.

Affidavit of Value.

UNITED STATES OF AMERICA,
District of Alaska, } ss:

C. P. Cahoon, C. G. Lewis, W. S. Hawes, Charles P. Leitch, and Bert L. Woodin, being first duly sworn, each for himself says:

I am one of the defendants in the above-entitled action, and am acquainted with the two claims in controversy in said action, namely, the "McConaghy claim," otherwise known as the "Peter Hall" claim, and the "Hackley claim," also known as the "Chisholm claim;" that I am familiar with and know the value of mining claims on McKinley creek on which these claims are situated and in the immediate vicinity of these claims, and that I know the value of the two claims in controversy and dispute, and the value of each of them; that each of said claims in controversy in this suit is worth not less than $5,500, and that they both together exceed in value the sum of $11,000, and did exceed in value the said sum when this suit was begun.

C. P. CAHOON.
C. G. LEWIS.
W. S. HAWES.
CHARLES P. LEITCH.
BERT L. WOODIN.

Subscribed and sworn to before me this 21st day of November, A. D. 1899.

[SEAL.]

M. E. McENANY,
Notary Public for Alaska.

Service accepted November 21st, 1899.

MALONY & COBB,
Attorneys for Plaintiff.

Endorsed: "Filed November 22nd, 1899. Albert D. Elliot, clerk."

That afterwards the following notice of appeal was filed:

In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Consisting of Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, Plaintiffs,

vs.

292 THE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Consisting of C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, Defendants.

To the above-named plaintiffs, the Alaska United Mining Company, consisting of Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, and Messrs. Cobb and Malony, their attorneys:

Take notice that the above-named defendants, conceiving themselves aggrieved by the rulings of the court in the above-entitled action, all of which were objected to and exceptions allowed by the court to the overruling of each and all of said objections, and by the rulings of the court upon said requests made before, after, and during the trial, and the insufficiency of the evidence to support the verdict in said cause and the ruling of the court thereon, and by the order and judgment entered on the 25th day of November, 1899, in favor of the plaintiffs and against the defendants in the above-entitled action and proceedings, and the overruling of the motion for a new trial and rehearing, do hereby appeal from said last-mentioned order, judgment, rulings, and decree to the Supreme Court of the United States, and said defendants pray that their appeal be allowed and that a transcript of the records, rulings, proceedings, papers, testimony, and evidence upon which said final order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN R. WINN,
Attorney for Defendant.

JUNEAU, ALASKA, *8th December*, 1899.

And now, to wit, on this 8th day of December, 1899, it is ordered that the appeal be allowed as prayed for.

CHARLES S. JOHNSON,
Judge of the District Court of the United States for the District of Alaska.

JUNEAU, ALASKA, *December 8th*, 1899.

Service of the above notice and appeal accepted by receiving a copy thereof at Juneau, said district of Alaska, this 8th day of December, 1899.

MALONY & COBB,
Attorneys for Plaintiffs.

(Endorsed:) Filed December 8th, 1899. Albert D. Elliot, clerk.

In the District Court of the United States in and for the District of Alaska.

THE ALASKA UNITED MINING COMPANY ET AL., Plaintiffs,
vs.
THE MCKINLEY CREEK MINING COMPANY ET AL., Defendants.

Order.

293 Come now the above-named defendants, by their attorney, John R. Winn, and pray the court to allow the said defendants sixty days from the date hereof in which to perfect the appeal or to sue out a writ of error of and in the above-entitled cause to the Supreme Court of the United States.

Dated this 14th day of December, 1899.

JOHN R. WINN,
Attorney for Defendant-.

The above application for time in which to perfect the appeal or sue out a writ of error in the above-entitled cause to the Supreme Court of the United States is allowed and the defendants given sixty days from the date hereof in which to perfect their appeal or sue out a writ of error or both in the said cause to the Supreme Court of the United States.

Dated this 14th day of December, 1899.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) Filed December 14th, 1899. Albert D. Elliot, clerk.

In the District Court of the United States for the District of Alaska.

THE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Appellant,
vs.
THE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Respondent.

Bond.

Know all men by these presents that we, The McKinley Creek Mining Company, a mining copartnership; C. G. Lewis, Bert L. Woodin, Charles P. Leitch, W. S. Hawes, and C. P. Cahoon, as principals, and Sam. Blum, as surety, of Juneau, Alaska, are held and firmly bound unto the above-named respondents, The Alaska United Mining Company, in the sum of two hundred and fifty ($250) dollars, to be paid to the said Alaska United Mining Company; for the payment of which, well and truly to be made, we bind ourselves and each of ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of December, 1899.

Whereas the above-named McKinley Creek Mining Company has prosecuted an appeal and sued out a writ of error to the Supreme Court of the United States to reverse the decree and judgment

rendered in the above-entitled suit by the judge of the district court of the United States in and for the district of Alaska:

Now, therefore, the condition of this obligation is such that if the above-named McKinley Creek Mining Company shall prosecuted said appeal to effect and answer all damages and costs if it or they shall fail to make the said appeal or writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE McKINLEY CREEK MINING COMPANY.
CHARLES P. LEITCH, *Secretary.*
CHARLES P. LEITCH.
C. P. CAHOON.
C. G. LEWIS.
W. S. HAWES.
BERT L. WOODIN.
SAM. BLUM.

Witnesses:
——— ———.
——— ———.

294 UNITED STATES OF AMERICA, *District of Alaska,* } ss:

C. G. Lewis, Bert L. Woodin, Charles P. Leitch, W. S. Hawes, C. P. Cahoon, and Sam. Blum, of Juneau, Alaska, being first duly sworn, on oath depose and say, each for himself: That I am one of the parties to the foregoing and within undertaking and a resident of the district of Alaska, and am worth over $500 in property in said district over and above my exemptions and property exempt from sale under the laws of said district, and am not a clerk of the court, attorney-at-law, U. S. marshal, or any other officer of any court whatsoever.

C. P. CAHOON.
CHAS. P. LEITCH.
BERT L. WOODIN.
C. G. LEWIS.
W. S. HAWES.
SAM. BLUM.

Subscribed and sworn to before me this 13th day of December, 1899.

JOHN R. WINN,
Notary Public.

[SEAL.]

Approved:
CHAS. S. JOHNSON, *Judge.*

December 13th, 1899.

No. 963. Filed December 13th, 1899.
ALBERT D. ELLIOT, *Clerk.*

295 THE ALASKA UNITED MINING CO. vs. THE MCKINLEY CREEK MINING CO. } No. 963. Order to Draw Jury.

Now, at this day, this cause coming on for trial, the plaintiffs appearing in person and by their counsel, Messrs. Malony & Cobb, and the defendants appearing in person and by their counsel, Messrs. Winn & Weldon, the venire of the petit jury was called by the clerk under the direction of the court, and the jurors being sworn as to their qualifications and being passed for cause by the plaintiff and defendant, the following-named jurors were sworn to try the issues, to wit:

H. C. Casebolt, John Clark, Donald M. Berry, Joseph French, G. L. Grant, L. A. Moore, Peter C. Jensen, G. W. Graves, J. M. Davis, Henry Hall, Frank Forrest, John Gorman, and there not being sufficient time to hear the testimony, it is ordered by the court that this cause be continued until 10 a. m. tomorrow.

296 THE ALASKA UNITED MINING CO. vs. THE MCKINLEY CREEK MINING CO. } No. 963. Trial.

Now, at this day, come again the parties hereto and their counsel, also the jury heretofore empaneled and sworn, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

Upon the request of parties, F. D. Kelsey was appointed and sworn reporter to report the testimony in this cause.

Peyer Hall, William A. Chisholm, James Hansen, Dan. Sutherland were sworn to testify on the part of plaintiff.

Whereupon plaintiff rests; thereupon defendant, by their counsel, move the court for a nonsuit in this cause, and being argued by the respective counsel and the court, being sufficiently advised in the premises, denies said motion, and there not being sufficient time to conclude the testimony, it is ordered that the trial of this cause be continued until Monday next at 10 o'clock a. m.

297 THE ALASKA UNITED MINING COMPANY, Pl'ff, vs. THE MCKINLEY CREEK MINING COMPANY, Def't. } No. 963. Trial.

Now, at this day, come again the parties hereto, the plaintiff being represented by Messrs. Malony & Cobb and the defendants being represented by Messrs. Winn & Weldon, also the jury heretofore empaneled and sworn, and being called by the clerk, and all answering to their names, the trial of this cause proceeded.

E. S. Hackley, E. G. Lewis, C. A. West, B. L. Woodin, Chas. P. Leitch, W. S. Hawes, Alex. McConaghy were sworn to testify on behalf of defendant, and there not being sufficient time to conclude the evidence, it was ordered by the court that the trial of this cause be continued until tomorrow morning at 10 o'clock.

298 THE ALASKA UNITED MINING COMPANY, Pl'ff, *vs.* THE MCKINLEY CREEK MINING COMPANY, Def't. } No. 963. Trial.

Now, at this day, come again the parties hereto and their counsel and the jury heretofore empaneled and sworn herein, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

Peter Hall was recalled and testified on the part of plaintiff. William A. Chisholm, James Hansen, & Dan. Sutherland were recalled and testified on the part of plaintiff. A. Lowe was sworn to testify on part of plaintiff; whereupon defendant rests.

The evidence being heard, the cause was argued by counsel, and, being charged by the court, the jury retired in charge of W. Harris, their sworn bailiff.

The jury in the above-entitled cause, having come into court, and being called by the clerk and all answering to their names, the plaintiffs being represented by Messrs. Malony & Cobb and the defendants being represented by Messrs. Winn & Weldon, return the following verdict, to wit:

"ALASKA UNITED MINING CO. *vs.* MCKINLEY CREEK MINING CO. } No. 963. Verdict.

We, the jury in the above entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Co., the claims in controversey.

J. MONTGOMERY DAVIS, *Foreman.*"

Whereupon the jury are discharged by the court from further attendance upon this cause.

299 THE ALASKA UNITED MINING CO. *vs.* THE MCKINLEY CREEK MINING CO. } No. 963. Order to Draw Jury.

Now, at this day, this cause coming on for trial, the plaintiffs appearing in person and by their counsel, Messrs. Malony & Cobb, and the defendants appearing in person and by their counsel, Messrs. Winn & Weldon, the venire of the petit jury was called by the clerk under the direction of the court, and the jurors being sworn as to their qualifications and being passed for cause by the plaintiff and defendant, the following-named jurors were sworn to try the issues, to wit:

H. C. Casebolt, John Clark, Donald M. Berry, Joseph French, G. L. Grant, L. A. Moore, Peter C. Jensen, G. W. Graves, J. M. Davis, Henry Hall, Frank Forrest, John Gorman; and there not being sufficient time to hear the testimony, it is ordered by the court that this cause be continued until 10 a. m. tomorrow.

300 THE ALASKA UNITED MINING CO.
vs.
THE MCKINLEY CREEK MINING CO. } No. 963. Trial.

Now, at this day, come again the parties hereto and their counsel, also the jury heretofore empaneled and sworn, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

Upon the request of parties, F. D. Kelsey was appointed and sworn reporter to report the testimony in this cause.

Peyer Hall, William A. Chisholm, James Hansen, Dan. Sutherland were sworn to testify on the part of plaintiff.

Whereupon plaintiff rests; thereupon defendant-, by their counsel, move the court for a nonsuit in this cause, and being argued by the respective counsel, and the court, being sufficiently advised in the premises, denies said motion, and there not being sufficient time to conclude the testimony, it is ordered that the trial of this cause be continued until Monday next at 10 o'clock a. m.

301 THE ALASKA UNITED MINING COMPANY, Pl'ff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Def't. } No. 963. Trial.

Now, at this day, come again the parties hereto, the plaintiff being represented by Messrs. Malony & Cobb and the defendant- being represented by Messrs. Winn & Weldon, also the jury heretofore empaneled and sworn, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

E. S. Hackley, E. G. Lewis, C. A. West, B. L. Woodin, Chas. P. Leitch, W. S. Hawes, Alex. McConaghy were sworn to testify on behalf of defendant, and there not being sufficient time to conclude the evidence, it was ordered by the court that the trial of this cause be continued until tomorrow morning at 10 o'clock.

302 THE ALASKA UNITED MINING COMPANY, Pl'ff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Def't. } No. 963. Trial.

Now, at this day, come again the parties hereto and their counsel and the jury heretofore empaneled and sworn herein, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

Peter Hall was recalled and testified on the part of plaintiff. William A. Chisholm, James Hansen, & Dan. Sutherland were recalled and testified on the part of plaintiff. A. Lowe was sworn to testify on part of plaintiff; whereupon defendant rests.

The evidence being heard, the cause was argued by counsel, and, being charged by the court, the jury retired in charge of W. Harris, their sworn bailiff.

The jury in the above-entitled cause, having come into court and being called by the clerk, and all answering to their names, the

plaintiffs being represented by Messrs. Malony & Cobb, and the defendants being represented by Messrs. Winn & Weldon, return the following verdict, to wit:

"ALASKA UNITED MINING CO.
vs.
MCKINLEY CREEK MINING CO. } No. 963. Verdict.

We, the jury in the above entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners, under the firm name and style of the Alaska United Mining Co., the claims in controversy.

J. MONTGOMERY DAVIS, *Foreman.*"

Whereupon the jury are discharged by the court from further attendance upon this cause.

303 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant.

Bill of Exceptions.

304 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Consisting of Peter Hall, William Chisholm, James Hansen, John Dalton, and Dan. Sutherland, Plaintiffs,
vs.
THE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Consisting of C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, Defendants. } No. 963.

Assignment of Errors.

Comes now the above defendant, The McKinley Creek Mining Company, and the other defendants mentioned above, composing the said mining copartnership, by John R. Winn, their attorney and solicitor, and specifies the following as errors that appear in the record, trial, and proceedings in the above-entitled cause, and upon which defendants will rely upon appeal to the Supreme Court of the United States:

I.

For the reason that it appears from the records and files in the above-entitled cause, which is 963 of this court, that no subpœna was ever issued out of said court in said cause and served upon the defendants or either of them, hence the court had no jurisdiction to

try and determine the matters in dispute therein; that it appears from the record in said cause that the bill of complaint was filed with the clerk of said court on June 16th, 1899, and that the answer was filed thereto on June 22nd, 1899, and the cause proceeded
305 to trial on June 23rd, 1899, and that at the time of proceeding to trial of said cause there was pending in this court a suit in ejectment, which is cause No. 967 of this court, wherein The McKinley Creek Mining Company *et al.* were plaintiffs and The Alaska United Mining Company *et al.* were defendants, being the same parties to the action in cause No. 967, and in which the title to the same mining property was and is in dispute in both causes No. 963 and 967; that in said ejectment suit, which is cause No. 967, there had been at the time and before entering upon the trial of cause No. 963 a summons issued and served and duly returned, and that on June 22nd, 1899, the McKinley Creek Mining Company filed in the above-entitled court, after having served the same upon the attorneys of the Alaska United Mining Company, the following notice and motion:

306 In the District Court of the United States for the District of Alaska.

THE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Plaintiff,
vs.
THE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Defendant.

Come now the above plaintiffs, by their attorneys, and move the court for the trial of the above-entitled cause, which is cause No. 967, commenced in this court in the nature of an ejectment for the trial of the title to two certain placer mining claims set out and more particularly described in the complaint on file herein in lieu of cause No. 963 of The Alaska United Mining Company *vs.* The McKinley Creek Mining Company, which is a cause on the equity side of this honorable court, praying for an injunction of the same subject-matter of action and involving the same mining claims, and that in case the said law case or suit in ejectment is not given priority and tried before said equity cause, then the court to hear said equity cause purely as an application for injunction pending cause No. 967, and grant no other relief except such equitable relief herein stated.

JOHN R. WINN,
R. D. WELDON,
Att'ys for Plaintiffs.

Endorsed: Filed June 22nd, 1899. Albert D. Elliot, clerk.

307 Which said motion was on said 22nd day of June, 1899, by the said court overruled and denied and an exception asked for and allowed to the McKinley Creek Mining Company *et al.*

The following are full, true, and correct copies of the pleadings, records, and files in said cause No. 967:

In the District Court of the United States for the District of Alaska.

C. G. LEWIS, BERT WOODIN, EDWIN HACKLEY, ALEX. McConaghy, Carl Al. West, W. S. Hawes, Charles P. Leitch, and Charles P. Cahoon, Copartners, under the Firm Name and Style of the McKinley Creek Mining Company, a Mining Copartnership, Plaintiffs,
vs.
WILLIAM A. CHISHOLM, PETER HALL, JAMES HANSEN, John Dalton, and Dan. Sutherland, Copartners, under the Firm Name and Style of the Alaska United Mining Company, a Mining Copartnership, Defendants.
} Complaint.

Come now the above-named plaintiffs, and for cause of action against the above-named defendants allege:

I.

That at all the times hereinafter mentioned plaintiffs have been and now are copartners in a mining copartnership under the firm name and style of the McKinley Creek Mining Company, and plaintiffs are now and have been at all the times mentioned herein citizens of the United States of America and residents of the district of Alaska.

That defendants are now and have been at all the times so mentioned herein copartners in a mining copartnership under the firm name and style of the Alaska United Mining Company, both
308 plaintiff-' and defendant-' copartnerships having been formed and organized for the purpose of working and operating mining claims within said district.

II.

That heretofore, to wit, on the 5th day of October, 1898, the above-named Edwin Hackley entered upon that portion of the United States Government mineral land hereinafter described and explored the same and discovered precious metal thereon, to wit, gold; and in compliance with the local rules and regulations of the Porcupine mining district and the laws of the United States governing placer mines, staked out and located the following piece or parcel of land situate on McKinley creek, a tributary of Porcupine river, district of Alaska, and described as follows: Beginning at the location post about 1,800 ft. above the falls on McKinley creek, upon which stake or post the location notice is posted, thence in an easterly direction at right angles to the course of the said creek 300 ft.; thence down the creek 1,500 feet, 300 feet from the center thereof and following its meanders, to the corner stake; thence 300 feet to the center of McKinley creek at a point about 300 feet above the said falls on said creek (stake on bank of creek for the lower post of said claim), continuing at right angles to the creek crossing the same 300 ft. to corner; thence up said creek 1,500 feet, 300 feet from the center of said creek, to corner; thence 300 feet to the place of beginning.

That heretofore, to wit, on or about the 8th day of October, 1898, the above-named Alex. McConaghy entered upon that portion of the United States Government mineral land hereinafter described, and explored the same and discovered precious metal thereon, to wit, gold; and in compliance with the local rules and regulations of the Porcupine mining district and the laws of the United States governing placer claims, staked out and located the following piece
309 or parcel of land situate on McKinley creek, a tributary of the Porcupine river, district of Alaska, and described as follows:

Beginning at the same post as the beginning post of the last-described claim, thence in an easterly direction at right angles to the creek 300 feet to the corner identical with the corner of the Hackley claim; thence up the creek, following its meanders and 300 feet from the center thereof, 1,500 ft. to corner; thence 300 feet to center of McKinley creek, stake on bank for upper post of claim; thence continuing and crossing said creek 300 feet to corner; thence down the creek and following the meanders thereof 300 feet from the center of the creek to corner; thence in an easterly direction 300 feet to the said creek and point of beginning.

That on the 29th day of May, 1899, the said Edwin Hackley and Alex. McConaghy transferred all their rights, title, and interest in and to said claims and each of them to the plaintiffs herein, being then the owners of the same, and the plaintiffs, as the McKinley Creek Mining Company, a mining copartnership, are now the owners and entitled to the possession of said placer mining claims and each of them.

III.

That the said Edwin Hackley and Alex. McConaghy have been up until said 29th day of May, 1899, at which time the plaintiffs herein became the owners, as aforesaid, and ever since said 5th and 8th days of October, 1898, respectively continually the owners of and entitled to the possession of all and each of the said placer mining claims so located, as aforesaid, and have occupied the same for the purpose of mining and extracting precious metals therefrom according to the laws of the United States and the local rules and regulations of the said Porcupine mining district governing placer mines.

310 IV.

That on or about the 20th day of May, 1899, the defendants wrongfully, unlawfully, and illegally and against the will and consent of these plaintiffs entered upon and took possession of said placer mining claims and each of them, and ever since said date have wrongfully withheld and now wrongfully withhold the same from these plaintiffs and each of them, and are extracting and will continue to extract gold and other precious metals from said claims, to the damage of these defendants in the sum of ten thousand dollars.

Wherefore plaintiffs pray judgment for the restitution of said property and all of the same, and that plaintiffs be declared to be the

owners of said property, together with the sum of ten thousand dollars damages for withholding the same, and the costs of this action.

JOHN R. WINN AND
R. D. WELDON,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Alex. McConaghy, being first duly sworn, say that I am one of the defendants and a member of the defendant copartnership in the within-entitled action. I have read the foregoing complaint, know the contents thereof, and the same is true as I verily believe.

ALEX. McCONAGHY.

Subscribed and sworn to before me this 21st day of June, 1899.

R. D. WELDON,
[SEAL.] *Notary Public for Alaska.*

(Endorsed:) "Filed June 22nd, 1899. Albert D. Elliot, clerk."

311 In the District Court of the United States for the District of Alaska.

C. G. LEWIS, BERT WOODIN, EDWIN HACKLEY, ALEX. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and Chas. P. Cahoon, Copartners, under the Firm Name and Style of the McKinley Creek Mining Company, Plaintiffs,
vs.
WM. A. CHISHOLM, PETER HALL, JAMES HANSEN, John Dalton, and Dan. Sutherland, Copartners, under the Firm Name and Style of the Alaska United Mining Company, Defendants. } Summons.

The President of the United States of America to William A. Chisholm, Peter Hall, James Hansen, John Dalton, and Dan. Sutherland, the above-named defendants, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, to answer the complaint of plaintiffs, wherein they demand restitution of the two mining claims therein described and $10,000 damages for detention of the same, and if you fail so to appear and answer, for want thereof the plaintiffs will take judgment against you and each of you for $10,000 damages and for the restitution of two certain mining claims situated on McKinley creek, in the district of Alaska, more fully described in the complaint, a copy of which is herewith served upon you, referred to and made a part of this summons, and for costs of suit, and this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons; hereof fail not.

Witness the Honorable Charles S. Johnson, judge of said district court, and the seal of said court, affixed at Skaguay, in said district, this 22nd day of June, A. D. 1899.

ALBERT D. ELLIOT, *Clerk.* [SEAL.]

JNO. R. WINN AND
R. D. WELDON,
Attorneys for Plaintiffs.

(Endorsed.)

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

I, James M. Shoup, United States marshal for Alaska, do hereby certify that the within summons came into my hands on the 22nd day of June, 1899, and that I personally served the same on the same day, at Skaguay, in said district, by delivering to John Dalton in person a full, true, and correct copy of said summons, duly certified to as such by me, together with a full, true, and correct copy of the original complaint in the within-entitled action, duly cer-
312 tified to as such by R. D. Weldon, one of the attorneys for plaintiffs.

JAMES M. SHOUP,
U. S. Marshal,
By J. M. TANNER, *Deputy.*

Returned and filed June 22nd, 1899.
ALBERT D. ELLIOT, *Clerk.*

In the United States District Court in and for the District of Alaska.

THE MCKINLEY CREEK MINING COMPANY, Plaintiff, }
vs.
THE ALASKA UNITED MINING COMPANY, Defendant. }

Now comes the above-named defendants, and for answer to the complaint of the above-named plaintiffs say:

I.

That there is another suit pending between the identical parties hereto, as plaintiffs and defendants, for the identical subject-matter of this suit and involving the identical questions herein involved, to wit, the cause of The Alaska United Mining Company *et al.*, as plaintiffs, being the identical parties sued herein as defendant, against The McKinley Creek Mining Company *et al.*, as defendants, being the identical parties suing herein as plaintiffs, which was filed in this court prior to the bringing of this suit on, to wit, the — day of June, 1899, and was pending in this court when this cause was filed, and the plaintiffs herein appeared and answered thereto, as is manifest from the records of this court herein.

Wherefore defendants pray that this cause be dismissed, and that

they go hence without day, and do have and recover from this plaintiff their reasonable costs herein incurred.

MALONY & COBB,
Attorneys for Defendants.

UNITED STATES OF AMERICA, *District of Alaska,* } ss:

J. H. Cobb, being first duly sworn, deposes and says: I am one of the attorneys for the defendants in the above and foregoing action. The above and foregoing answer or plea is true in point of fact and within my own personal knowledge, and for that reason I make this affidavit for the defendants.

J. H. COBB.

Subscribed and sworn to before me this the 10th day of July, 1899.

[SEAL.] M. GRINNELL,
Notary Public in and for Alaska.

Endorsed: Filed Aug. 5th, 1899. Albert D. Elliot, clerk.

313 In the District Court of the United States for the District of Alaska.

THE MCKINLEY CREEK MINING COMPANY, Plaintiff,
vs.
THE ALASKA UNITED MINING COMPANY, Defendant. } Reply.

Comes now the above plaintiff, and, replying to the answer on file herein, states:

I.

Referring to paragraph I thereof, admits that a bill of complaint was filed by the Alaska United Mining Company in which the McKinley Creek Mining Company is defendant, but denies that the subject-matter of said suit or the relief sought therein involves the same subject-matter as this suit, but that the action of the Alaska United Mining Company against the McKinley Creek Mining Company, cause No. 963, pending in this court, is brought upon a bill in equity seeking a restraining order against the McKinley Creek Mining Co. and alleging that the McKinley Creek Mining Company and the parties forming said company are trespassing upon two certain mining claims which the Alaska United Mining Company pretends and claims to be the owner of and entitled to the possession thereto, and prays that the McKinley Creek Mining Company, its agents, employés, and etc., be enjoined and restrained from working or attempting to work said placer mines, being the same two mines which are in controversy herein.

II.

But in this cause, which is cause No. 967 of the files and records of this court, the action is a suit in ejectment for the purpose of trying title and the right of possession to the same two mining

claims which are in controversy in cause No. 963; that the two said suits were commenced and the bill of complaint in one case was filed with the clerk of this court on June 16th, 1899; that no subpœna at said time was issued or never has been issued or served therein, and that the complaint herein was filed with the clerk of this court June 22nd, 1899, and the summons issued and returned on the same day, with service upon the Alaska United Mining Company; all of which appears of record in this court.

Wherefore plaintiff prays judgment against the defendant herein, as demanded in his complaint in this cause, with costs.

JOHN R. WINN,
Attorneys for Plaintiff.

A copy of the foregoing reply to defendant's answer in the within-entitled action is accepted & service of the same hereby acknowledged this 16th day of November, 1899.

MALONY & COBB,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *District of Alaska*, } ss:

I, C. G. Lewis, being first duly sworn, say that I am one of the plaintiffs in the within-entitled action, and make this verification on behalf of said McKinley Creek Mining Co., a copartnership. I have read the foregoing reply to defendant's answer, know the contents thereof, and the same is true, as I verily believe.

C. G. LEWIS.

Subscribed and sworn to before me this 16th day of Nov., 1899.

[SEAL.] M. E. McENANY,
Notary Public for Alaska.

314 (Endorsed:) "Filed November the 16th, 1899. Albert D. Elliot, clerk."

In the District Court of the United States in and for the District of Alaska.

C. G. LEWIS ET AL., Copartners under the Firm Name and Style of the McKinley Creek Mining Company, Plaintiffs,
vs.
THE ALASKA UNITED MINING COMPANY, Defendant. } No. 967.

This matter coming on this 13th day of December, 1899, on motion of Malony & Cobb, attorneys for the defendant, for dismissal of said cause of action on the grounds and for the reason that there is another cause now pending in this court, being that of The Alaska United Mining Company *vs.* The McKinley Creek Mining Company, cause No. 963 of this court, which said cause has been tried and determined and final judgment entered thereon in this court and the same now pending on appeal in the United States Supreme Court,

and the said motion being based upon the files and records of the court herein, and John R. Winn appearing for the McKinley Creek Mining Company, and the court, being fully advised in the premises, allows said motion, and said cause No. 967, being the above-entitled action, is hereby dismissed; to which ruling, order, and dismissal the plaintiffs ask an exception, and an exception is by the court allowed.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) "Filed December 13th, 1899. Albert D. Elliot, clerk."

315 The court erred in the proceedings, rulings, and orders made and rendered as above set forth.

2.

That while the witness Peter Hall, on the part of the plaintiffs, was upon the witness stand he was asked by plaintiffs' attorney the following questions:

Q. When was the first time you went upon these claims?
A. On or about the 20th of October—the 19th or 20th.
Q. That same year (meaning 1898)?
A. Yes, sir.
Q. What, if anything, in the way of a location notice did you find on that claim from the statement made to you by Mr. Cahoon?
A. I found my location notice on the stake there, and I copied it as near as I could.
Q. Look at that instrument (counsel hands witness a paper); is that a copy made from the tree or post that that was on?
A. Yes, sir.
Q. That is your handwriting?
A. Yes, sir.
Q. It was made the first time you went upon the claim on or about the 20th day of October?
A. Yes, sir.
Q. You filed this for record, did you?
A. Yes, sir.

Counsel for the plaintiffs offer in evidence the location notice which has just been identified by the witness.

316 Counsel for the defendant objected to the introduction of the location notice in evidence for the reason that the notice is signed by Hall himself and not pretended to be a location notice signed by Cahoon under any power of attorney for Hall, and for the further reason that the location notice is too indefinite and uncertain. The objection was overruled by the court; to which ruling counsel for the defendant then and there dule excepted, and exception was by the court allowed. The location notice was admitted in evidence, marked Plaintiffs' Exhibit "B," and read to the jury as follows:

"*Location Notice.*

"Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1,500 ft. running with the creek and 300 ft. on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm's claim on about 1,800 ft. from the first falls above the Porcupine river, in the district of Alaska.

PETER HALL, *Locator.*"

Witnesses:
J. HANSEN.
D. SUTHERLAND.

(Endorsed:) Peter Hall location, McKinley Cr. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded in Book 6, Placers, on page 107, of the records of said district. Norman E. Malcolm, district recorder.

The court erred in admitting said location notice in evidence over the objection of counsel for defendants, because it is not the notice that plaintiffs base their title on in their pleadings, being made by Peter Hall himself and signed by him, and not by the defendant Cahoon, and was made long after one of the defendants herein had located and discovered precious metals on said claim, as will appear from the evidence in said cause, and the court erred for the further reasons stated in the objections of the introduction of the said location notice in evidence.

3.

317 On cross-examination of Peter Hall by counsel for the defendants the following questions were asked the said Hall and rulings made by the court and exceptions allowed to the defendants:

Q. Now, Mr. Hall, isn't it a fact that when Cahoon returned (being the same Cahoon who had power of attorney for Hall) to Pleasant camp at the time you say the conversation took place about his telling you he had staked you a claim, and before you parties left up there (meaning Pleasant camp), you and Cahoon, Hawes, Chisholm, and Sutherland on that trip, and while Cahoon was at Pleasant camp, didn't you have a conversation with him about the time he told you he had located you about going into partnership and forming a company?

A. He spoke of it.

Q. That was agreeable to you at that time?

By the COURT: "I don't see how that is material."

By Judge WINN: The fact is I want to show they had a partnership, and it was always understood at all times, and he (meaning Hall) drew out for reasons, and he (meaning Hall) runs back up there (meaning where the claims are in dispute) and stakes these claims, and also the witness testified this morning and has detailed

a part of the conversation, and I am undoubtedly entitled to the whole conversation.

By the COURT: "I don't think it is material."

Counsel for the defendants excepts to the rulings of the court.

The judge raised the objection to the introduction of the testimony and committed an error thereby, and by his rulings,
318 for the reasons stated above, and for the further reason that it was a material fact to show that Peter Hall, one of the plaintiffs, had agreed to and it was always understood up to and until about the 20th day of October, 1898, that Hall was a copartner with some or all of the defendants herein.

4.

While the witness William A. Chisholm was on the stand on behalf of the plaintiffs the following questions were asked said witness and answers made thereto and rulings of the court and exceptions allowed:

Q. When did you go on the ground yourself (meaning the ground in controversy)?

A. About the 19th of October.

Q. Who was with you then?

A. Peter Hall, James Hansen, Dan. Sutherland, and Jack Dalton.

Q. What in the way of a notice, if anything, did you find on the claim?

A. We found the notice that we had recorded. It was partially blotted—I think partly chipped off; that is the way I took it to be.

Q. You copied it off the best you could?

A. Yes, sir; the best we could.

Q. Look at that notice.

A. Yes, sir; that is it.

Q. That is your handwriting?

A. Yes, sir.

Q. That is the copy of the notice?

A. Yes, sir.

Q. That you recorded here?

A. We recorded in the Porcupine district.

Counsel for the plaintiff offered the copy of the notice in
319 evidence. Counsel for the defendant objected to the introduction of the notice in evidence for the reason that the same is incompetent and immaterial, that the same has no description, and is not a proper location notice. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted. The copy of the notice having been admitted in evidence, marked Plaintiffs' Exhibit "C," the same was read to the jury, as follows:

Location Notice.

Notice is hereby given that I, the undersigned, have this 6th day of Oct., 1898, located a placer mining claim 1,500 ft. along creek bottom and 300 ft. from center of creek each way on creek known

as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim, and about 300 ft. above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, *Locator.*

Witness:
D. SUTHERLAND.
JAMES HANSEN.

(Endorsed:) Wm. A. Chisholm location, McKinley Cr. United States, district of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21st, 1898, and duly recorded in Book —, on page 106, of the records of said district. Norman E. Malcolm, district recorder.

Q. That was on the 20th of October?
A. The 19th or 20th. I wouldn't be positive.

Q. State to the jury whether you have always claimed that
320 location since it was made for you by Mr. Cahoon.

Counsel for the defendant objected to the above question for the reason that the same is incompetent and immaterial and calling for a conclusion of the witness. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

A. Yes, sir.

The court erred in each of said rulings so made.

5.

The court erred in allowing the witness Jas. Hansen, who was called on behalf of the plaintiffs, to answer the following question:

Q. State to the jury what you know about them (Hall and Chisholm) outfitting Cahoon.

Counsel for the defendant objected to the above question for the reason that the same is leading, suggestive, and calling for a conclusion of the witness. Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. State, if you know, anything about it.
A. Mr. Chisholm and Mr. Hall outfitted us with what grub we took along.

And on cross-examination the following questions were asked
the witness Hansen by counsel for the defendants, and the
321 following rulings made by the court and exceptions allowed
by the court, and the court erred in his said rulings to the prejudice of the defendants:

Q. Did you hear any further conversation that took place between Cahoon and Hall or Chisholm or either one of them, yourself being present, before they left Camp Pleasant, in regard to anything to be done with the claims they had staked out or anything of that kind?
A. No, sir.

Q. They didn't talk about taking all the claims and making a partnership of it?

Counsel for the plaintiff- objected to the above question for the reason that the same is immaterial.

By the COURT: I will sustain the objection. I don't think it is material. Counsel for the defendant duly excepted to the ruling of the court.

Q. You say that Sutherland found colors on the other claim (meaning one of the claims in controversy); did you see Hackley find anything on that claim while you were up there (meaning the time when the claims were first staked out)?

A. No, sir.

Q. You were with him all the time?

A. Yes, sir.

Q. Right along by his side?

A. Yes, sir.

Q. You started out side by side?

A. Most of the time we were close together.

Q. How many days were you up there?

A. Two days.

322 Q. Right along together, side by side, all the time?

By the COURT: "You have followed that long enough; it is not a material point."

Counsel for the defendant duly excepted to the ruling of the court.

And the court erred in said ruling for the reason that it was material to show what was done at the time and who was the first discoverer of precious metals upon the claims in controversy.

Q. Before you came down to Sunshine camp, didn't you and Cahoon and all of you that *that* was in this party, including Hackley, take your claims in a bunch and for- a partnership?

Counsel for plaintiff- objected to the above question for the reason that the same was immaterial. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Daniel Sutherland, one of the plaintiffs, and called on behalf of the plaintiffs, was asked the following questions by the attorneys for the plaintiffs:

Q. What, if anything, in the way of locations did you see Cahoon make there?

A. He didn't locate that day.

Q. What day did he?

A. On the 6th (meaning the 6th day of October, 1898).

Q. State to the jury what locations were made on the 6th.

Counsel for the defendants objected to the above question for the reason that the same is calling for a conclusion of the witness.

323 Objection overruled by the court; to which ruling counsel for the defendants then and there duly excepted.

A. We stopped at a certain point where there was a snag stuck up amongst the rocks, and Cahoon said he believed he would locate the boys here as we go up, and I said, All right; and he located Chisholm on the lower side and Hall on the upper side.

7.

At the close of the evidence and testimony of the plaintiffs in the case counsel for the defendant, as will be shown from the record in said cause, in open court moved the court for a nonsuit and for an instruction to the jury to return a verdict for the defendant company, for the reason that neither one of the parties, Chisholm and Hall, who are claiming the respective claims in controversy, have complied with the laws of the United States in staking out and recording the two claims, and that the same was not done within the time required by law after the claims were staked out, as shown by the testimony by Mr. McConaghy and Hackley, and that there is nothing in the evidence as it stands to show that any discovery has ever been made or had ever been made by either of the claimants Hall or Chisholm upon either one of the claims in controversy of precious metals, and that the evidence in the case is not sufficient to sustain a verdict for the plaintiff company, which holds as successor in interest of Chisholm and Hall, who were two of the members of the plaintiff company; and for the further reason that it has not been shown by the evidence that the said Chisholm and Hall were citizens of the United States at the time of the loca-
324 tion of said claims in controversy; which said motion was overruled and denied by the court and an exception allowed.

The court erred in making said ruling as it would appear from the evidence in said cause, and also that there was no proof of any kind or nature offered as to the citizenship of either Mr. Chisholm or Hall.

8.

C. P. Cahoon was then called as a witness and in regard to putting up certain notices upon the two claims in controversy, under which said notices Chisholm and Hall were claiming to be owners of the said two claims. The following questions were asked the witness Cahoon and the following rulings were made by the court, all of which defendants claim as error prejudicial to their interests, to wit:

Q. About where was Sutherland and Hackley prospecting at the time you did your writing in regard to these two claims in controversy?

A. I should judge about 100 ft. from there.

Q. On which one of the claims?

A. On the Hackley claim.

Q. What was your intention of putting that notice on the snag (meaning the location notice under which Hall and Chisholm lay

claim of ownership to the two mining claims in controversy and which were claimed by Cahoon as being temporary locations)?

Counsel for the plaintiff- objected to the above question for the reason that the same is improper and immaterial and the notice speaks for itself as the acts of the agent.

By the COURT: I think the intention must be determined
325 by the jury as a question of fact. The witness might say that I put it there for such and such reasons; it wouldn't be binding on the jury. The jury must find that out from the acts themselves. The objection is sustained. Counsel for the defendant duly excepted to the rulings of the court, and claimed that it is error, among other reasons, for the reason that Cahoon was acting as agent under power of attorney for Chisholm and Hall, and that his acts and intentions in taking up and locating a mining claim would be binding upon his principals, Chisholm and Hall.

And the further questions were asked the said witness after the acts and doings of the 6th of October, 1898:

Q. You came down to the camp the next day, the 7th. Now, state what was done then.

A. Mr. Hackley, Mr. Hansen, and Mr. Sutherland came in about noon, and Mr. Hackley made a further discovery on his way in, and he had a very fine sample of gold which he discovered on the claim as now located as the McConaghy claim, and we got to talking the matter over amongst ourselves, and the boys were all there then—Hansen and Sutherland and Lewis and McConagy, West and myself—and we came to the conclusion it was very——

Q. Never mind the conclusion, state the conversation you had with Hansen and these people about any of the claims in controversy.

Counsel for the plaintiff- here urged an objection, and the question was changed as follows:

326 Q. Now, just state briefly, without any conclusions or preludes, as to what conversation took place at this time.

A. Well, we had a very fine prospect and we thought we would get at it in a business manner, and we talked about going into a company and throwing all of our claims together.

Counsel for the plaintiffs objected to that portion of the above answer relative to going into a company for the reason that the same cuts no figure in reference to the location of these claims, and that the matter is foreign to the issues in this case. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. What else took place there at that time, Mr. Cahoon, leaving out the question as to partnership?

By Judge WINN: If the court please, I would like to complete my record on the question your honor has just ruled and save my exceptions.

By the COURT: Yes; you can make what record you want.

Q. Now, was there any talk had at that time or any conversation had about you and the other parties who now constitute the McKinley Creek Mining Company and Chisholm and Hall going into a partnership to work and operate the claims that had been staked out by you and Hansen and the other parties previous to this date?

Counsel for the plaintiff objected to the above question for the reason that the same cuts no figure in reference to the location of these claims in controversy, and that the matter is foreign to the issues in this case, and on the further grounds that the same is incompetent, irrelevant, and *incompetent*. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. I will ask you, following up that conversation, as to whether any such a conversation did take place—that you afterwards communicated this to Hall and Chisholm.

327 Counsel for the plaintiffs objected to the above question for the reason that the same is immaterial, irrelevent, and incompetent. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. I will ask you whether or not, if you did so, that Hall and Chisholm ratified and agreed as to what conversation you had down there.

Counsel for the plaintiff objected to the above question for the reason that the same is immaterial, irrelevent, and incompetent. Objection sustained by the court; to which ruling counsel for the defendants then and there duly excepted.

Q. Now, Mr. Cahoon, I wish you would go ahead and state to the jury what else took place at this time and any conversation that took place, leaving out the question about the McKinley Creek boys and Sutherland, and Hansen, and Chisholm, and Hall, and Dalton going into a copartnership with you boys.

A. The question arose as to whether that power of attorney I had was legal and would hold. We didn't know. It was drawn up in British Columbia, and there was some doubt as to whether that was legal or would hold in case any claims were staked.

Q. Well, Hansen and Sutherland were present, were they?

A. Yes, sir.

Q. What else took place between you people present?

A. Mr. Hackley wanted to know why I didn't take that stake down.

Counsel for the plaintiffs objected to the above answer for the reason that the same is immaterial.

By the COURT: "What you can show is what he did towards attempting to remove that location—find out what he did."

Q. What did you do?

328 A. I told him it was too late the evening before and dark, and I couldn't do it, and I told him I would take them down

(meaning the stakes which Cahoon had previously put up and under which Chisholm and Hall are claiming title).

Counsel for the plaintiffs objected to the above answer and moved that the same be stricken out for the reason that the same is incompetent and irrelevant and immaterial.

By the COURT: "The testimony on the part of the plaintiff was that Hackley was standing by and didn't object, and this witness doesn't claim that he did object until he came along some time afterwards."

By Judge WINN: "That was the first time he knew it."

By the COURT: "This witness says he knew it the 6th; this was the 7th. I will grant the motion to strike it out."

Counsel for the defendants duly excepted to *to* the ruling of the court.

Q. Now, did you have any conversation there with Hackley at this time about these notices that you had written upon this stump, that you have stated, wherein you put the name of Hall on one and Chisholm on the other, at this time, in the presence of Sutherland and Hansen, two of the plaintiffs in this cause?

Counsel for the plaintiff- objected to the above question for the reason that the same is immaterial, incompetent, and irrelevant. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. What other conversation did you have there, Mr. Cahoon?

A. I don't know; they object to every conversation we had.

Q. I will ask you if you had any conversation with Hackley and Hansen and Sutherland in regard to these two claims in controversy and as to whether or not that conversation was afterwards communicated to Hall and Chisholm.

329 Counsel for the plaintiff- objected to the above question for the reason that the same is immaterial, irrelevant, and incompetent. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

It is evident that the court erred in the above rulings for reasons too numerous to state, but principally that Cahoon was acting as agent for Chisholm and Hall; and, further, that any conversations that he had with any of the plaintiffs which were afterwards communicated to Chisholm and Hall would be binding upon all the plaintiffs, especially if it was anything pertaining to the claims in controversy and was ratified by Chisholm and Hall; and, further, upon the question of good faith to show that Cahoon was acting for Chisholm and Hall, and that Chisholm and Hall, Hansen and Sutherland and Dalton were all going into a partnership and bunch the claims, and in such case it was immaterial as to what claim or set of claims Chisholm and Hall had, for if they were in a mining copartnership they would all share alike in the profit of the group of claims, and it would be immaterial if Hall and Chisholm under these circumstances were the owners of the two claims

in controversy or the other two claims staked out by Lewis and afterwards relocated by Cahoon for them, and after the first staking of the claims in controversy Cahoon returned to Pleasant camp, and the following questions were asked him concerning the conversation has there:

Q. State when you got back to Pleasant camp who you left there and what conversation you had, if any.

A. I met Mr. Hawes and Mr. Hall and Mr. Chisholm, and we talked the matter over, and I told them just what I had done.

Q. State to the jury and the court the words you used without stating any conclusions.

330 A. I told Mr. Hall and Mr. Chisholm and Mr. Hawes that I had put up a temporary notice in the creek—that is, told them just how I had worded it and everything, and that there was an objection raised as to whether the claims would be legal under that writing given there in British Columbia, and that we had decided to form a company, and we thought the proper thing to do was to stake the claims of the boys in the creek, both the plaintiff and the defendant in this suit; stake what boys were in the creek, let them stake first, and then stake those three claims at the upper end of the creek.

Q. What three claims?

A. Mr. Hall, Mr. Hawes, and Mr. Chisholm, and in case they couldn't hold these claims it wouldn't leave a gap in the ground that we had staked.

Q. Hawes had remained at Pleasant camp, and you had taken his power of attorney along?

Counsel for the plaintiffs objected to the above question for the reason that the same is leading. Objection sustained by the court; to which ruling counsel for the defendant then and there duly excepted.

Q. Well, was this all the talk you had then upon this subject of claims before you left Pleasant camp, with these other boys, Hansen, Chisholm, and Hall?

A. That evening, on the 8th, Mr. Dalton came down from the interior, and Mr. Chisholm came to me and he says, Don't you think it would be to our advantage to take Mr. Dalton into our company? and I told him, So far as I was concerned I was willing to take Dalton in, as he was an old-timer.

331 Counsel for the plaintiffs objected to the above answer and to the witness stating anything about a company or taking in Jack Dalton for the reason that the same is incompetent and immaterial. Objection sustained by the court; to which ruling counsel for the defendants then and there duly excepted.

Q. Was there any conversation had there with Hall and Chisholm and Dalton, members of this plaintiff company, in regard to forming a copartnership to work and operate this bunch of claims that had been staked out together?

Counsel for the plaintiff- objected to the above question for the reason that the same is incompetent, immaterial, and irrelevent. Objection is sustained by the court; to which ruling counsel for the defendants then and there duly excepted.

Q. Now, leaving out the question, then, of any partnership agreement that was had between you and these parties last mentioned, go ahead and state to the jury if anything else was said about these claims in controversy at this time, before you left Camp Pleasant.

A. We were to meet the other boys at Boulder creek on the evening of the 9th and all go down to Chilkat and draw up the papers for this company.

Q. Was that where you started for?

A. Yes, sir; the arrangements had been made before we left the creek.

Counsel for the plaintiff- objected to the above answer for the reason that the same is incompetent, immaterial, and irrelevant. Objection sustained by the court; to which ruling counsel for the defendants then and there duly excepted.

Q. For what purpose were you all to meet down at Chilkat again?

A. We were going down there to draw up the papers for
332 this company.

Counsel for the plaintiffs moved to strike out the last answer for the reason that the same is immaterial and incompetent and irrelevent.

(By the COURT:)

Q. Was Mr. Chisholm and Mr. Hall present?

A. Yes, sir.

By the COURT: "It is not material on the line to show of the forming of the company, but it might be material as tending to contradict the witnesses of the plaintiff."

Q. Now, Mr. Cahoon, state briefly to the court and jury what work has been done upon these claims in controversy, including the Hackley and McConaghy claim.

A. We whipsawed something over four thousand feet of lumber and built a trail the whole length of them; we put in a flume, which was broken twice on the claim by their rolling boulders down onto us.

Counsel for the plaintiffs objected to the witness stating anything about any boulders being rolled down. Objection sustained by the court; to which ruling counsel for the defendants then and there duly excepted.

All of which said rulings were manifest error in the proceedings and trial of said cause.

9.

E. S. Hackley was called on the part of the defendants to testify, nd the location notice of Hackley was identified and introduced in vidence and marked Defendants' Exhibit No. "1," which is *to* two the claims in controversy.

10.

C. G. Lewis was then called as a witness on the part of the defendnts, and on cross-examination by counsel for the plaintiffs the folwing questions were asked the said Lewis by attorneys for plainffs:

3 Q. I want to read to you a part of an answer which was filed on the 16th of June, in which a man by the name of cConaghy—he is one of your partners?

A. Yes, sir.

Q. (Here counsel pretends to read from some paper:) "That the id Chisholm and Hall * * * still unlawfully and forcibly * * and against the will and consent of the said defendants aintained possession of the said claims, to the exclusion of the said fendant, and prevents the said defendant, The McKinley Creek ining Company, from working and operating the said claim." If cConaghy has sworn to this answer and the facts are true while all and Chisholm were in possession how could you do this work at you say you did after the 16th of June?

Counsel for the defendants objected to the above question for the ason that the same is calling for a conclusion of law; that it n't matter whether a party enters upon a foot or the whole of your aim; if he takes a foot of it, it constitutes an ouster. This is a eading that I drew myself and I drew it under the authorities; if party is working upon a mining claim it is an ouster if he crosses ur boundary line.

(By the COURT:)

Q. Do you recollect whether or not you ever knew the contents that?

A. I heard it read.

(By the COURT:)

Q. You knew the contents of it?

A. Yes, sir.

Objections overruled by the court; to which ruling counsel for e defendants then and there duly excepted.

Q. Is it not a fact that much of this improvement that was put there was put on after the 16th day of June, 1898?

A. We have been working on there all summer.

4 Q. Is it not a fact that you put on there, known as the Hall and Chisholm claims, the improvements knowing that Hall d Chisholm were in possession of the claims?

A. No; they were working on there the same as we were.

11.

B. L. Woodin was called to testify on behalf of the defendants. The witness Hall, while he was upon the stand on the trial, testified that all of the parties concerned herein left Sunshine camp, Alaska, to meet afterwards at Chilkat, Alaska, for the purpose of making out and recording location notices for the claims in controversy, and Hall also testified upon the previous trial at Skaguay, Alaska, and the following questions were asked the witness Woodin by defendants' attorney:

Q. You heard Hall testify at Skaguay, too, did you not?
A. Yes, sir.
Q. Did he ever say anything in his testimony at Skaguay about going down from Sunshine to Chilkat for the purpose of making out papers to record?
A. I never heard him say it.
Q. What did he testify at Skaguay that he left Sunshine to go to Chilkat for?
A. I don't remember.
Q. Did he say anything about going to record papers down there?

Counsel for the plaintiffs objected to the above question for the reason that the same is not proper.

By the COURT: "He has just answered that."

Counsel for the defendant duly excepted to the ruling of the court.

12.

Alex. McConaghy, called as a witness, identified notice of location under which he claimed one of the mining claims in
335 controversy, and afterwards C. G. Lewis was recalled and identified the same and it was offered in evidence and admitted and filed as Defendants' Exhibit "3."

13.

Peter Hall was then called upon the witness stand by the plaintiffs in rebuttal and was asked the following questions by attorneys for plaintiffs, among others, to wit:

Q. Mr. Hall, they all so testify (meaning witnesses for defendants) about you testifying up above (meaning upon the first trial, at Skaguay) that you didn't know what Cahoon and Lewis went back for. Did you hear that testimony (meaning what Cahoon and Lewis went back up the creek for when the parties were all at Sunshine camp subsequent to the first staking out of the claims)?
A. Yes, sir.
Q. The testimony that you gave on your former examination was the same testimony that you gave now, is it not?

And an objection was sustained on the question on the ground of its being leading.

Q. State what you testified to up there.
A. It was the same.

Then the witness was cross-examined by John R. Winn:

Q. When you were on the witness stand here you testified they
ent back up there (meaning from Sunshine camp up the creek to
here the claims were) to rectify the staking. Some one had over-
taked the claims?
A. Yes, sir.
Q. Now, you do know, do you?
A. I would like to explain that. You asked me the question in
Skaguay, just before that, if I told you what I knew, and I
336 supposed you wanted to know what I understood about it.
Q. Didn't I just ask you before this a half a dozen questions
s to what they went back there for, and also incorporated in it that
ou were there and heard all the conversation, and then I asked you
he question, and you didn't know what they went back for?

Counsel for the plaintiffs objected to the above question for the
eason that the same is unintelligible to the witness. Objection sus-
ained by the court; to which ruling counsel for the defendant then
nd there duly excepted.

Q. Didn't I ask you several questions before, and in each of these
uestions I was trying to find out whether or not you knew what
'ahoon went back for, and to each one of these questions you
nswered the same thing—that you didn't know for what purpose
hey went back for after having this conversation in your presence?

By the COURT: "If the witness can remember them."
Counsel for the defendant duly excepted to the remarks of the
ourt.

A. No; I can't remember it.

Manifest error was committed by the cou.t in sustaining the ob-
ection to my question above stated for the further reason that the
vitness on the part of the defendants testified that some time after
he 6th day of October, 1898, and the first pretended staking of the
laims in controversy, a meeting was had at Sunshine camp with
Hall and Chisholm and some of the other plaintiffs and defendants,
herein an agreement was arrived at that Hall and Chisholm had
greed at said time to accept two other claims in lieu of the two in
ontroversy, and that accordingly Cahoon, under the power of attor-
ney from Hall and Chisholm, together with C. G. Lewis, one
337 of the defendants, went back up McKinley creek from Sun-
shine camp, restaked the other two claims for Hall and
Chisholm; and on the previous trial of this case at Skaguay this
witness testified, as was stated by several of the witnesses for the de-
fendants, that Hall then testified that he didn't know what Cahoon
and Lewis went back up the creek for from Sunshine camp, and now
upon this trial he testifies that they went back up the creek to rectify
some staking, and the question propounded was an impeaching one
and one which the witness should have been forced to answer, and

he readily got out of it by taking up the court's suggestion and saying, "No; I can't remember it," and the court erred in making this remark and suggestion while the witness was testifying.

14.

And after the close of the evidence in the case on the part of plaintiffs and defendants counsel for defendants moved the court to instruct the jury to render a verdict for the defendants for the reason that the plaintiffs in the case had utterly and completely failed to prove the material allegations of the complaint, and it conclusively appears from the testimony that McConaghy and Hackley were and are the only qualified persons to hold the two claims in controversy; and it is conclusively proven that McConaghy and Hackley were the original discoverers of gold upon the claims, and that there is not a syllable or word of testimony that either Hall or Chisholm or their agent Cahoon ever discovered any gold on either one of the claims; that Hackley was upon the claims at all times from the time he made the discovery until the location was made by him; that Hall and Chisholm have not proven themselves to be citizens of the United States, and that there is no evidence to sustain a verdict in the case on behalf of plaintiffs should the jury render one.

338 Motion denied by the court; to which ruling counsel for the defendants then and there duly excepted.

And the court erred in overruling said motion for the reason and upon the ground severally mentioned therein.

15.

That in the pleadings the question of citizenship of Hall and Chisholm is made an issue, and there is not a syllable of testimony upon the question, and as it plainly appears that the location notices under which Hall and Chisholm are claiming were made out by themselves, signed and executed by the respective parties, and that was done on the 20th day of October, 1898, and after the two claims in controversy had been located by McConaghy and Hackley, two of the defendants herein, and that at no time did either Hall or Chisholm ever ask Cahoon to complete any location by and under the power of attorney which it is claimed in the pleadings that Hall and Chisholm had given Cahoon, but the evidence shows, if anything, that Hall and Chisholm can only claim under and by virtue of the location notices which they made out, the respective claims, the 20th day of October, 1898, and dated them on the 6th, and this was not an act of Cahoon, but was a location, if anything, by Hall and Chisholm without reference to any power of attorney that was ever given to Cahoon by these parties.

16.

And at the close of the testimony counsel for the defendant company tendered to the court in writing the following instructions to be given to the jury; which said instructions were refused when the court failed to give the same, or were given in a modified form.

339 To the refusal of the giving of said instructions so offered and tendered and modified counsel for the defendant company, immediately upon the retirement of the jury, asked an exception, and the same was in each case allowed.

Instruction No. II offered and tendered by the defendants, which read as follows:

I instruct you that the burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence—that is, the greater weight of evidence—the following facts in order to recover.

1. That the said plaintiff company or some of its members were the first and the original locators, and by exploration and discovery of precious metals and in compliance with the local rules and regulations of the Porcupine mining district and the laws of the United States located and took up the two claims in controversy.

2. I also instruct you that under the paper which has been offered in evidence in this case that C. P. Cahoon was constituted the agent of Peter Hall, William Chisholm, and William Hawes to locate mines in the district of Alaska, and that anything done by the said Cahoon for either the said Hall, Chisholm, or Hawes in the way of locating mines would be binding upon Hall, Chisholm, or Hawes just the same as though they had been the actual acts of either of the said last-mentioned parties; and any conversation had with the said C. P. Cahoon relative to the location, staking out, and taking up of claims or a claim for either of the said parties would be binding upon the party the same as if it was his own conversation.

The instruction was offered in the manner and form above stated and the court modified it by adding on the following after the last sentence of the said instruction No. II:

340 "But a location once made by an agent cannot be abandoned or surrendered except by consent of the principals given either before or after such abandonment."

Such modification was misleading to the jury for the reason that the court at no time defined to the jury what it took to constitute a good and valid location.

17.

The court erred in not giving instruction No. III offered by defendant, as aforesaid; which instruction read as follows:

"I further instruct you that if you find that C. P. Cahoon, in putting the location notices on the stake for Hall and Chisholm, only intended the same as a preliminary affair until the said Cahoon could determine and decide upon where he would put the permanent location for the said parties or either of them, and that the said Cahoon afterwards determined to permanently locate the said Chisholm or Hall or either of them at some other place and did so, then the last location made by the said Cahoon would be binding upon Chisholm, Hall, and Hawes or any one of the three for whom location was made in this manner."

18.

The court also erred in not giving instruction No. IV as offered

and tendered by the defendant company, as aforesaid; which instruction read as follows:

"I also further instruct you in this connection that if you find that Edwin Hackley, one of the defendants in this case, was exploring and prospecting one of the claims at the time Cahoon went upon the same or attempted to stake the same, and Cahoon was forbidden so to do, then the said Cahoon had no right so to do, and Hackley was entitled to insist upon his own right to have further time to explore and prospect the ground and determine whether
341 *the ground and determine whether* or not he would take up the claim, and an understanding was had between Cahoon and Hackley that the said Cahoon put up the notices upon this claim in controversy only temporarily, and would afterwards remove the same to another location, or that the same were put up against the will and consent of the said Hackley, Hackley being then upon the ground and the first discoverer, or without the knowledge of Hackley, then the acts done by Cahoon would not be binding upon Hackley, nor could the plaintiff, who is attempting to take advantage of this first location, claim any rights thereunder. The reason of this is that prospectors are not compelled to stake out a claim and then prospect it, but, on the contrary, they have the right to first prospect, and then determine as to whether or not they will locate upon that particular piece of ground or take up some other unoccupied piece. Also a party has the right to make a preliminary staking of a piece of ground, and then afterwards change the location to some other piece or place of ground that is equally open for occupancy and staking out and taking up such as a mining claim."

The court erred in not giving instruction No. 5 offered by defendants, as aforesaid, which reads as follows:

"In this case Cahoon had the right on the part of Chisholm, Hall, and Hawes, or either of them, to make a preliminary staking of a claim for them or either of them, and then afterwards changed the same to some other location, and the same would be binding upon Chisholm and Hall or either of them, as the facts may apply. Cahoon, being the agent of Chisholm and Hall, had the perfect right to bind both of them or either of them in the matter of temporarily staking out a mining claim."

342 20.

The court erred in not giving instruction No. VII offered and tendered by the defendants, as aforesaid, which reads as follows:

"And, gentlemen of the jury, if you find that Cahoon, acting under this power of attorney from Hall and Chisholm, in the first instance made a good and valid staking-out of both of the claims in controversy for the respective parties, Hall and Chisholm, but that afterwards the said Cahoon, acting as agent of Hall and Chisholm, under and by virtue of said power of attorney, abandoned the said two claims or either of them, and that the said Hall and Chisholm afterwards ratified and consented to such abandonment and the staking out of other claims for them (Hall and Chisholm) in lieu of the two

first staked, then the said ratifications of the said acts of the
343 said Cahoon and the abandonment of the same by him would date back to the time, and the abandonment would be counted from the date on which the said Cahoon attempted to or really did abandon the two first locations, although the said Cahoon may not in the first instance have had the authority or right to abandon the first claims, and if McConaghy and Hackley in the meantime, between the time the said Cahoon abandoned the two first claims or attempted so to do, located, staked out and discovered or had prior to that time discovered precious metals upon the said claims in controversy, then such location of the said Hackley and McConaghy would be a good and sufficient location, and your verdict must be for the defendant in this case."

21.

The court erred in not giving instruction No. VIII offered and tendered by the defendants, as aforesaid, which read as follows:

"I also instruct you that there is something more required to make a good location of a placer mining claim than the mere putting up of stakes and the making of proper location notices in writing and filing the same. In order to make a good and sufficient location in the eyes of the law, it requires discovery of precious metals upon the claim, and also appropriation of the land embraced in such notice. A location can rest only upon the actual discovery of precious metal (in this case gold). Such discovery must precede the location or be in advance of intervening rights. Priority of discovery gives priority of right against naked location and possession without discovery. So in this case, gentlemen of the jury, if you find that the location made by Cahoon of the two claims in controversy was made without the said Cahoon's, prior thereto, discovering precious metal or gold, and that said location was in every respect legal, excepting the discovery of precious metal upon the
344 premises, and that Hackley and McConaghy found upon their respective claims and discovered gold and made a subsequent location to that of Hall and Chisholm, and that the said Hackley and McConaghy were the original discoverers of gold upon the said claim or discovered it before the said Cahoon or the said Hall or Chisholm, then the location of the said claims by Hackley and McConaghy is a better location than that of Hall and Chisholm, although Hackley's and McConaghy's location of said claims may be subsequent in date to that of Cahoon; and if you find said facts in favor of Hackley and McConaghy, then you should find a verdict for the defendant company."

21.

The court erred in not giving instruction No. IX as offered and tendered by the defendants, which read as follows:

"I also instruct you that if you find that the two location notices offered in evidence by Hall and Chisholm were not made out and signed by Cahoon, but that Hall and Chisholm, some time on the 19th or 20th of October, had the same made out and signed them

respectively, or that they copied them or either of them from the notices which they found upon the claims in controversy which had been placed there by Cahoon, one of the defendants herein, prior to the 20th day of October, that such location notice would not be good from the 6th day of October, 1898, but would only serve as a location from the date that they were actually made out and signed by the respective parties Hall and Chisholm, and the act would be the act of Hall and Chisholm personally, and in order to make their respective claims good in this action they and each of them would have had to make at that time a discovery of precious metal
345 on the respective claims, and then if Hackley and McConaghy had taken up these claims and made a discovery prior to the time that Hall and Chisholm signed the location notices, then the location and appropriation of Hackley and McConaghy must prevail, and it would be your duty to find a verdict in favor of the defendant."

The court erred in modifying instruction No. XI; which instruction, as offered, read as follows:

"There are several ways of impeaching a witness, gentlemen of the jury, and one of the manners in so doing is to show that a witness on some previous trial swore to a material fact in a different way than he did on a subsequent trial, and if you find that any witness who is testifying before you testified differently upon a former trial to some material fact in this case, or if you find that some witness who has testified before you has willfully testified falsely to some material fact upon this trial, then you have a right, if you so choose, to disregard the entire testimony of the said witness, except so far as it may be corroborated by other credible evidence in the case."

The instruction given by the court after the modification read as follows:

"There are several ways of impeaching a witness, gentlemen of the jury, and one of the manners in so doing is to show that a witness on some previous trial swore to a material fact in a different way than he did on a subsequent trial, and if you find that any witness who is testifying before you has willfully testified falsely to some material fact upon this trial, then you have a right, if you so choose, to disregard the entire testimony of said witness unless the same be corroborated by other credible evidence in the case."

346 The court erred in making said modification for the reason that if any witness, and it was attempted to show that two of the plaintiffs' witnesses did testify differently upon the first trial of said cause from what they testified to on the second trial—that is, that Chisholm and Hall on the first trial testified that they didn't know for what purpose Lewis and Cahoon left Sunshine camp and went back up McKinley creek; and the witnesses on the part of the defendant company testified that they went back up the creek at the request of Hall and Chisholm to stake out other claims than those in controversy, which was a material fact in the case, and if the jury had found it true would have been a complete ratification of the acts then done by Cahoon in the way of locating other claims than the

two in controversy, and the jury should have been instructed on this feature of the case.

22.

And the court erred in the failure to give each and all of the instructions so offered and tendered by the defendant company for the reason that each and all of the same were applicable to the facts in the case and are the law.

23.

The court erred in giving the following instruction, which was the first instruction given on behalf of the plaintiff company at the request of plaintiffs' attorney:

"Gentlemen of the jury, you are instructed that on the 6th day of October, 1898, the ground in controversy in this suit belonged to the United States, and was open to location as mining claims. You are further instructed that there is no such thing in law as a temporary location for mining claims, and if you find and believe from the evidence that on the 6th day of October, 1898, C. P. Cahoon, acting under the power of attorney introduced in evidence before
347 you, located the ground in controversy for Peter Hall and Wm. Chisholm, that such location was an appropriation of such ground and gave the said Hall and Chisholm title to it," for the reason that said instruction is against the law and evidence of the case, for the evidence shows that Hackley, one of the plaintiffs herein, was upon said claim on the 5th day of October, 1898, and made a discovery of gold thereon, and was still on the claim and prospecting the same on the 6th day of said month and year for the purpose of locating and taking up the same, and that there is no evidence in the case to show that the said Cahoon legally or otherwise staked out and took up said claim on the 6th day of October, 1898, and that the said Cahoon never did complete his location of either of the said claims in controversy for Chisholm and Hall, and that there is in law such a thing as a temporary or preliminary location of a mining claim.

24.

And the court erred in following up the above instruction with the following instruction:

"You are further instructed that if under the above instructions you find the ground in controversy was located and the title acquired by Peter Hall or William Chisholm, such title could only be lost under the facts of this case by an abandonment, and if you find and believe from the evidence that the said Peter Hall or William Chisholm did not abandon the claims in controversy and did not ratify any attempted abandonment of them by Cahoon, you will find for the plaintiff," for the reason that the said instruction is not the law, in that it states to the jury that the plaintiffs Hall and Chisholm must abandon said claims, and also ratifying any attempt made by Cahoon to abandon the same, and if Chisholm or Hall or

either of them either abandoned the claims in controversy
348 or ratified the restaking of the claims, then they lost their rights; and the court did not in connection with said instruction or at any time define to the jury what it took to constitute a good and legal location.

25.

Also the court erred in giving the following instruction at the request of plaintiffs:

"You are further instructed that when land has once been located as a mining claim any other location of it made subsequently thereto, while the first location is in full force and effect, is void; and if you find and believe from the evidence that there was any abandonment of the ground in controversy by Peter Hall or Wm. Chisholm, but such abandonment was made after the locations of Hackley and McConaghy, under which defendants claim under date of October 8th, 1898, then the said locations of William McConaghy and Hackley were void, and there is evidence before you that Peter Hall and William Chisholm once again went upon the ground and restaked it and replaced their notices on or about the 20th day of October, 1898," for the reason that the court invaded the right of the jury in commenting upon the facts and evidence and telling the jury what had been established by the evidence, and for the further reason that the instruction is not the law that governs the case, in that the action is based upon the location made by C. P. Cahoon as attorney-in-fact for Hall and Chisholm, and anything that they might have done on the two claims in controversy on the 20th day of October, 1898, was not a matter in issue by the pleadings. Immediately upon the retirement of the jury to deliberate upon a verdict an exception was asked to the foregoing instructions by counsel for the defendant company, and in each case an exception was allowed.

349 The court also erred in not giving the following instruction, which was asked by the defendants and refused by the court: "I also instruct you that in order for the plaintiff to recover it must be proven that Hall and Chisholm were at the time they located and took up their respective claims citizens of the United States," for the reason that it was an issue in the case, made by the pleadings, and it was necessary under the circumstances to be proven, and the court, on the contrary, instructed the jury as follows, which was excepted to by the defendants, and exception allowed, to wit: "The instructions I have read you cover the law features of this case pretty completely. The question of the citizenship of the plaintiffs has been raised by counsel in their argument, and I charge you that the citizenship of either the plaintiff or the defendant in this case is not an issue of fact to be determined by you at all; it is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States, the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man against another cannot question the citizenship of either. If you apply for

a patent the United States has the right to question the citizenship, because the purpose is to get a title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens that could be only taken advantage of by the Federal Government;" which said last instruction is against the law and the issues made up by the pleadings in this case, for in the complaint it is alleged that Hall and Chisholm were citizens of the United States at the time Cahoon attempted to locate the claims in controversy, and that said allegation is denied by the defendants in their answer.

350 The court also erred in instructing the jury of its own accord as follows, which instruction was duly excepted to by the defendants, to wit: "Now, much has been said by counsel as to a preliminary location, and as to the time a man has to explore his premises before another man has a right to locate, because it is contended on one side that Hackley was the discoverer and on the other side that Sutherland was, and on that point of discovery I instruct you that any of these persons, if they saw or extracted or failed to extract, but saw being extracted any precious metals, it is a sufficient discovery to authorize him or them to make a location—so I say any of these persons, if they saw gold taken from the ground, that they are discoverers in the sense that authorizes a man to locate. Now, just a word as to the time a man has after discovery before he must take steps to locate. It must be a reasonable time. A man cannot discover gold in one place and hold the whole world at bay while he explores the whole creek; he must act promptly. It is the policy of the law to allow to the thrifty the benefit of their energy, and it is often the experience that the discoverer does not get the best claims. He must make up his mind within a reasonable time, and it is a question of fact for the jury, and he is not permitted to hold the whole district until such time as he may determine which claim he desires to locate."

The last instruction or instructions are not the law, and the court commented upon the facts and usurped the power of the jury in indicating to them that Hackley, one of the defendants, did not use diligence sufficient in locating his claim after the discovery of gold thereon, and also indicated to the jury that Hackley tried to

351 hold the whole world at bay and take up and occupy all the mining property on McKinley creek, which indication is not bourne out by the testimony in the case, was misleading to the jury and in every way prejudicial to the interests of the defendants, and did not properly define what a reasonable time is nor leave that question for the jury to decide, and the evidence shows that Hackley never attempted to hold any ground on McKinley creek except that covered by one of the claims in controversy, which is designated as the Hackley claim.

28.

The court also erred in giving the following instruction, which was duly excepted to by the defendants, to wit:

"The question of abandonment is a question of fact to be deter-

mined by the jury from all the surroundings and circumstances. It is a question of intent, and it is encumbent upon the jury to determine from the facts in the case, if you find that the location was made for Chisholm and Hall, as to whether or not it was in their minds to relinquish, abandon, and give up the claims alleged to have been located, and Cahoon himself, as agent, could not abandon for them; they must do that. After he made a location his agency was at an end. He had nothing further whatever to do with it, and you must determine, if you find a location was made by him and it was prior to the other locations, whether Chisholm and Hall at any time subsequent to the location did abandon and give up what location they had acquired, because if they did they ratified and confirmed the further acts of their agent, which he was not authorized to do, but which he might do if they afterwards confirmed, ratified, and consented to it."

The said instruction does not state the law as applicable to the facts, and instructs the jury that before an abandonment
352 could take place by any act of Cahoon that the acts of Cahoon must be confirmed, ratified, and consented to by Chisholm and Hall, and the law is, if an act of an unauthorized agent is either confirmed or ratified or consented to, it is sufficient and does not require that it be confirmed and ratified and consented to, nor does the court attempt in any of the instructions to tell the jury what constitutes a good and legal location of a mining claim under the laws of Alaska, and leaves the jury to guess at what is a good location.

29.

And after the submission of the case to the jury they rendered the following verdict:

"ALASKA UNITED MINING COMPANY
vs.
THE MCKINLEY CREEK MINING COMPANY. } No. 963.

Verdict.

We, the jury in the above entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Co., the claims in controversy.

J. MONTGOMERY DAVIS, *Foreman.*

(Endorsed:) Filed November 14th, 1899. Albert D. Elliot, clerk."

30.

And within twenty-four hours thereafter the following motion was filed by the defendants:

53 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, a Mining Co-partnership, Plaintiffs,
vs.
THE McKINLEY CREEK MINING COMPANY, a Mining Co-partnership, Defendants.
} Motion.

Come now the above defendants, by their attorney-, Jno. R. Winn nd R. D. Weldon, and move the court for a judgment in the above-ntitled cause in favor of the defendants, notwithstanding the verdict erein, for the reason that the said verdict is against and contrary the law and evidence in said cause, and for the further reason at the evidence is insufficient to justify or support said verdict, nd that upon said evidence the defendants herein are entitled to a dgment in their favor for the possession of the mines and property n controversy herein.

JNO. R. WINN,
R. D. WELDON,
Att'ys for Defendants.

A copy of the above and foregoing motion is accepted and service f the same acknowledged this 15th day of November, 1899.

MALONY & COBB,
Att'ys for Plaintiffs.

(Endorsed:) Filed November 15th, 1899. Albert D. Elliot, clerk.

54 Which said motion was overruled and denied by the court and is as follows:

THE ALASKA UNITED MINING COMPANY
vs.
THE McKINLEY CREEK MINING COMPANY.
} No. 963.

Order Denying Motion.

The motion for judgment on file in this cause coming on to be eard and being submitted without argument is by the court over-uled.

JOHN R. WINN,
Attorney for the Defendant Excepting.

And the court erred in overruling and denying said motion for he reasons set out in said motion and for the reasons herein as-igned.

31.

And within twenty-four hours after the rendition and filing of aid verdict in said cause the following motion was filed for a new rial and rehearing, to wit:

In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Plaintiffs,
vs.
THE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Defendants.
} Motion for New Trial.

Come now the above defendants, by their attorneys, John R. Winn and R. D. Weldon, and move the court to grant a new trial or rehearing in the above-entitled cause. Said motion is made upon the following grounds, to wit:

355

I.

Upon the evidence taken by the reporter and all other testimony offered or admitted in this cause, and the rulings made and excepted to during the progress of the trial, and the pleadings and proceedings on file in the clerk's office in this cause and in cause No. 967 of The McKinley Creek Mining Company, a mining copartnership, plaintiffs, *vs.* The Alaska United Mining Company, a mining copartnership, defendants, which are also of record and on file in this court.

II.

Insufficiency of the evidence to justify the verdict of the jury in said cause, and that said verdict is against law.

III.

Errors in law occurring at the trial and excepted to by the defendants, and exceptions to the instructions given by the court to the jury, and exceptions to the refusal of the court or judge thereof to give certain instructions offered by the defendants and numbered "III, IV, V, VII, VIII, IX."

JOHN R. WINN AND
R. D. WELDON,
Attorneys for Defendants.

A copy of the within motion accepted and service acknowledge this 15th day of November, 1899.

MALONY & COBB,
Attorneys for Plaintiffs.

(Endorsed:) "Filed November 15th, 1899. Albert D. Elliot, clerk."

And the court overruled said motion for a new trial and rehearing, and the order overruling the same is as follows:

56 In the District Court of the United States for the District of Alaska.

HE ALASKA UNITED MINING COMPANY, a Mining Copartnership, Plaintiff,
vs.
HE MCKINLEY CREEK MINING COMPANY, a Mining Copartnership, Defendant.

The motion for a new trial and rehearing heretofore filed in the bove-entitled cause on the 15th day of November, 1899, by the bove-named defendant, The McKinley Creek Mining Company, a ining copartnership, duly and regularly coming on for hearing is 21st day of November, 1899, before the judge of the above-enlled court, and the court, having heard counsel for plaintiff and fendant and being fully advised in the premises, does hereby overle and deny the motion for a new trial or rehearing of said cause; which ruling and decision of said court the defendants except d exception is by the court allowed, and counsel for the defendant en and there in open court gives notice of intention of filing a noe of appeal and application for a writ of error to the Supreme urt of the United States.

Done in open court this 21st day of November, 1899.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) "Filed November 21, 1899. Albert D. Elliot, clerk."

And the court erred in overruling and denying said motion for e reasons set out in said motion and for the reasons herein asgned.

57 And immediately thereafter the defendants, by and through their attorney and counsel, filed the following objections, to it:

the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY
vs.
THE MCKINLEY CREEK MINING COMPANY. } Objections.

Comes now the McKinley Creek Mining Company and objects to he entry and signing of any judgment in favor of the above plainffs and against the defendants herein, and said objection is based pon all the objections and exceptions heretofore taken and made y the defendants herein upon the trial and before and after verict rendered, and for the reason that the evidence does not justify ny judgment and will not support the same as against the defendnt and in favor of plaintiff herein.

II.

Objects to the form of judgment offered by the plaintiff herein for he reason that the same is against the law and facts in said cause nd pleadings and proceedings therein, and that if the said cause is

tried as an equity case and on the equity side of the court that the only judgment that could be entered herein would be restraining the defendants from the acts complained of in the bill of complaint pending the trial of cause No. 967 of The McKinley Creek Mining Co. *vs.* The Alaska United Mining Company, which is a suit in ejectment now pending in this court and at issue, the records and files of which are hereby referred to and made a part of this objection.

III.

That the verdict rendered herein is not sufficient in form to justify any judgment herein.

IV.

That the description in the jud-ment does not conform to and cover the same ground described in the bill of complaint or cover the property in controversy herein, and that there is no evidence or proof as to what constitutes a proper description of the property herein, or at least to justify the court in signing the judgment tendered by the plaintiffs herein.

V.

Objects to the taxation of any costs in said suit at this time for the reason that no cost bills have been filed and that the same has not been taxed by this court according to law, and the amount mentioned in the judgment is not taxable costs under rules and law governing the practice in this court.

358 VI.

Further objects to the entry of any judgment herein against the defendant and in favor of the plaintiff for any placer mining claim or claims or any ground or grounds, mineral or otherwise, for the reason that there is no proof or evidence in said cause of any staking, legal or otherwise, of any placer or mineral ground by any of the members of the plaintiff company.

JOHN R. WINN,
Attorney for Defendants.

(Endorsed:) "Filed November 22, 1899. Albert D. Elliot, clerk."

That the judgment and decree made and entered in this cause is as follows:

In the United States District Court for the District of Alaska.

THE ALASKA UNITED MINING COMPANY
vs.
THE MCKINLEY CREEK MINING COMPANY. } In Equity.

This cause came on to be heard at this term upon the bill, the answer, and cross-bill of defendants and the replication thereto of plaintiffs and the proofs in the case, and upon the request of de-

fendant-, duly made by their counsel, Messrs. Winn & Weldon, the issues arising upon said pleadings and proofs were submitted to a jury of good and lawful men, duly selected, impanneled, and sworn, to wit, J. Montgomery Davis and eleven others, who, having heard the said proofs adduced in the case, and having been instructed by the court as to the law, and having heard the argument of counsel, retired in charge of the bailiff to consider of their verdict, and after due deliberation had returned into open court the following verdict, to wit:

THE ALASKA UNITED MINING COMPANY
vs.
MCKINLEY CREEK MINING COMPANY. } No. 963.

Verdict.

We, the jury in the above entitled and numbered cause, find for the plaintiffs, Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy.

(Signed) J. MONTGOMERY DAVIS, *Foreman.*

Which said verdict was by the court received and ordered recorded, and the findings therein contained upon the issues in said cause were by the court approved and adopted.

Now, therefore, upon consideration of the said bill, the answer thereto, and the cross-complaint of said defendants, the replication of plaintiffs, and the said proofs, and by reason of the verdict of the jury thereon, approved and adopted by the court, it is, upon consideration thereof, ordered, adjudged, and decreed as follows, to wit:

That the said defendant-, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, a mining copartnership under the name and style of the McKinley Creek Mining Co., have not nor have
359 any of them any right, estate, title, or interest whatever in or to those two certain mining claims, lands, and premises described in the said bill of complaint and in the said answer and cross-complaint of defendant and hereinafter more particularly described; that the title of the plaintiff, The Alaska United Mining Company, a corporation composed of Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, thereto is good and valid, and that the said defendants and each of them be, and they and each of them are hereby, forever enjoined and restrained from asserting any claim whatsoever in or to said mining claims, lands, and premises adverse to said plaintiffs, and that the said plaintiffs be, and they are hereby, quieted in their possession, use, and enjoyment of the same. Said two mining claims, lands, and premises are described as follows, to wit:

Situate in the district of Alaska, in the Porcupine mining district, on McKinley creek, a tributary of the Porcupine river, about twelve

hundred feet above the confluence of the said McKinley creek with the Porcupine river, and bounded and described as follows:

1st claim. Beginning at the location post, about 1,800 — above the first falls of McKinley creek, upon which post the location notice is posted and which stands at the center of the claim on the northerly end thereof on bank of said creek, thence in an easterly direction at right angles to the course of said creek 300 ft.; thence down the creek in a northerly direction, parallel to the course of said creek and 300 feet distant therefrom, 1,500 feet to the corner post; thence westerly at right angles to the former course 300 feet to the corner of McKinley creek at a point about 300 feet above the first falls on McKinley creek, continuing crossing said creek at right angles to the course thereof 300 feet, 600 feet in all, to a corner post; thence in a southerly course, parallel to the creek and 300 feet distant therefrom, 1,500 feet to corner; thence 300 feet to the place of beginning, being the claim located by Wm. A. Chisholm on the 6th day of October, 1898.

2nd claim. Beginning at the location post of the last-described claim of Wm. A. Chisholm, which is also the location post for this claim, upon the southerly or upper side of which the location notice for this claim was also posted, thence in an easterly direction at right angles to the creek 300 feet to corner identical with the northeasterly corner of the Wm. A. Chisholm claim; thence in a southerly direction up the creek and parallel therewith 1,500 feet to corner; thence 300 feet to a stake on bank of McKinley — for center post of claim, continuing crossing McKinley creek at right angles thereto 300 feet, 600 feet in all, — corner; thence down the creek and 300 feet therefrom 1,500 feet to corner; thence 300 feet to place of beginning, and being the claim located on the 6th day of October, 1898, by plaintiff Peter Hall.

It is further ordered, adjudged, and decreed that said plaintiffs do have and recover of and from said defendants, jointly and severally, their costs herein incurred and taxed at thirty-one and $\frac{10}{100}$ ($31.10) dollars; for which let execution issue as provided in rule 8 of the equity rules.

Dated 25th day of November, 1899.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) Filed November 25th, 1899. Albert D. Elliot, clerk.

33.

And immediately thereafter the defendants filed the following application for a supercedeas bond:

360 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, Plaintiff, vs. THE MCKINLEY CREEK MINING COMPANY, Defendant. } Application for Supersedeas Bond.

Comes now the above defendant, The McKinley Creek Mining Company, a mining copartnership, and the court having overruled

the motion for a new trial and a rehearing and entered judgment upon the verdict herein against the defendant company and in favor of the plaintiff company, and petitions and moves this honorable court to set the amount of a supersedeas bond to stay proceedings in said cause pending appeal and writ of error to the Supreme Court of the United States, which notice of intention to appeal and the suing out of a writ of error have been given in open court. The defendant company moves and prays the court that the amount of said stay bond be set in order that the defendant company may, pending the appeal and writ of error to the U. S. Supreme Court, remain in the possession of that part of the property and mining claims in controversy that is shown by the pleadings and evidence that said defendant has been in possession of since the commencement of this action, or that the court enter a restraining order herein restraining both the plaintiffs and defendants from working or extracting gold from said mines in controversy while said cause is pending in the U. S. Supreme Court.

This motion is made upon the files and records of this cause in this court.

Dated this 25th day of November, 1899.

JOHN R. WINN,
Attorney for Defendants.

(Endorsed:) "Filed November 25th, 1899. Albert D. Elliot, clerk.

Which said objections and each and all of them except the one as to the taxation of costs were overruled and denied by the court, and also the application for a supersedeas bond; which order overruling and denying the same is as follows, to wit:

THE ALASKA UNITED MINING COMPANY, Plaintiff,
vs.
THE MCKINLEY CREEK MINING COMPANY, Defendant. } No. 963. Order.

The objection- of the above defendant to the form of judgment entered herein in favor of the plaintiffs and against the defendants coming on for hearing on this 25th day of November, 1899, *and* said objections, except the one with reference to costs, are, and each of the same —, overruled by the court; to which ruling of the court the defendant asks an exception to the overruling of each objection, and exception is allowed by the court; thereupon the court signs a judgment in said cause; to which judgment and decree so entered and signed the defendant asks an exception, and the same is by the court allowed. The application and motion for a supersedeas bond and restraining order filed herein by the defendant pending the suing out of a writ of error and appeal of the above-entitled cause to the Supreme Court of the United States coming on for hearing after the signing of the final judgment herein, the court overrules the same and each of the same, and one of the reasons assigned for so doing by the court is that the cause above entitled was tried as an

equity one and on the equity side of the said district court; to which overruling of the application for a restraining order and stay
361 bond the defendant asks an exception, and the same is allowed, and defendant gives notice of intention of suing out a writ of error and serving a notice of appeal to the United States Supreme Court.

Wherefore the said McKinley Creek Mining Company, a mining copartnership, consisting of the following-named individuals, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, pray that the judgment of the district court of the United States in and for the district of Alaska be reversed, and the verdict and judgment herein rendered by said court be set aside and held for naught, and that a new trial be granted in said cause, and the said defendants have such other and further relief as they are under the law entitled to.

JNO. R. WINN,

Attorneys for the Defendants and Plaintiffs in Error, The McKinley Creek Mining Company, Consisting of C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon.

362 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY *et al.*, Plaintiff-, *vs.* THE MCKINLEY CREEK MINING COMPANY *et al.*, Defendant-.	Notice of Settlement of Bill of Exceptions on Appeal.

To Malony & Cobb, attorneys for plaintiff-:

Please take notice that the proposed bill of exceptions of the defendants herein and the plaintiffs' amendments thereto will be presented to the judge of this court for settlement on the 16th day of January, 1900, on the arrival of the "Cottage City," at Sitka, on that date or as soon thereafter as said Cottage City arrives at Sitka, at his chambers, in the court-house at Sitka, district of Alaska, and you will further take notice that the defendants herein, at said time, will move the court to make the pleadings, files, and records of this court in the case of C. G. Lewis *et al.*, copartners, under the firm name and style of the McKinley Creek Mining Company, a mining copartnership, plaintiffs, *vs.* Wm. A. Chisholm *et al.*, under the firm name and style of the Alaska United Mining Company, No. 967, made a part of the bill of exceptions in this case on appeal.

And you will further take notice that the defendants first above named, by their attorney, John R. Winn, will move the court at said time for an order shortening the time for serving of said notice of settlement of bill of exceptions in conformity with the said notice.

JNO. R. WINN,

Attorney for the Defendant The McKinley Creek Mining Company.

Dated this 12th day of January, 1900.

363 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY ET AL., Plaintiff-,
vs.
THE McKINLEY CREEK MINING COMPANY *et al.*, Defendant-.

Order Shortening Time of Serving Notice.

It is hereby ordered that the time for serving notice of settlement of bill of exceptions on appeal is hereby shortened to conform to the above and foregoing notice of settlement of bill of exceptions, and the same is set for hearing on Jan. 31, 1900, upon the arrival of the steamship Cottage City, at Juneau, Alaska, or as soon thereafter as counsel can be heard.

CHARLES S. JOHNSON, *Judge.*

Dated this 18th day of January, 1900.

Service of above notice and order admitted Jan'y 12th, 1900.
MALONY & COBB,
Solicitors for Pl'ffs.

Endorsed: Filed January 18th, 1900. Albert D. Elliot, clerk.

364 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY, a Copartnership, Plaintiff,
vs.
THE McKINLEY CREEK MINING COMPANY, a Copartnership, Defendant.

Motion to Court to Make Special Findings.

Now come the above-named defendants, by their attorney, John R. Winn, and move the court to make a statement of the facts of the case in the nature of a special verdict and certify the same to be transmitted to the Supreme Court on appeal in the above-entitled cause, together with a transcript of the proceedings or judgment or decree, in accordance with sec. 2, chap. 80, of an act concerning the practice in territorial courts and appeals therefrom, passed by the Congress of the United States April 7th, 1874.

JNO. R. WINN,
Attorney for Defendants Above Named.

The above matter come on for hearing in the above-entitled court on the 6th day of February, 1900, counsel for both plaintiff and defendant being present, and the court overruled said motion in so far as the same requests a statement of the facts or special verdict being made by the court; to which ruling an exception is allowed defendant, but allows the same in other respects and signs and allows the bill of exceptions.

365 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY ET AL., Plaintiffs,
vs.
THE McKINLEY CREEK MINING COMPANY *et al.*, Defendants.
} Citation of Appeal.

UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

To the Alaska United Mining Co., a mining copartnership, and Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, 1900, pursuant to an appeal filed in the clerk's office of the district court of the United States of America in and for the district of Alaska, wherein The McKinley Creek Mining Company, a mining copartnership, and C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, C. P. Leitch, and C. P. Cahoon are appellants and The Alaska United Mining Co., a mining copartnership, and Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland are respondents, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of February, A. D. 1900.

CHARLES S. JOHNSON,
Judge of the District Court of the United States for the District of Alaska.

366 Service of the within and foregoing citation admitted this 6th day of Feb'y, 1900. Received copy of the same.

MALONY & COBB,
Attorneys for Plaintiffs.

366½ [Endorsed:] No. —. In the district court of the United States for the district of Alaska. The Alaska United Mining Co. *et al.*, plaintiffs, *vs.* The McKinley Creek Mining Co. *et al.*, defendants. Citation of appeal. Filed Feb. 6, 1900. Albert D. Elliot, clerk. John R. Winn, attorney for defendant; office, Juneau, Alaska.

367 Service of the aboye and foregoing bill of exceptions is admitted this 12th day of January, 1900.

MALONY & COBB,
Solicitors for Plaintiffs, The Alaska United Mining Co.

The foregoing bill of exceptions is correct, and it is hereby agreed that the same may constitute a part of the record and be certified to

the United States Supreme Court and there be used as the bill of exceptions in this cause.

——— ———,

Solicitors for Plaintiffs, The Alaska United Mining Co.

——— ———,

Attorneys for Defendants, The McKinley Creek Mining Co.

The foregoing bill of exceptions is correct and is hereby settled and allowed and ordered to be made a part of the record in this cause and appeal allowed.

CHARLES S. JOHNSON, *Judge.*

Dated Sitka, Alaska, this 6th day of February, 1900.

368 In the District Court of the United States for the District of Alaska.

THE ALASKA UNITED MINING COMPANY ET AL., Plaintiffs, *vs.* THE McKINLEY CREEK MINING COMPANY *et al.*, Defendants. } Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

I, Albert D. Elliot, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to three hundred & sixty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Alaska United Mining Company, a mining copartnership, composed of Peter Hall, Wm. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, plaintiffs, against The McKinley Creek Mining Company, a mining copartnership, consisting of C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, C. P. Leitch, and C. P. Cahoon, defendants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, in the town of Juneau, in said district, the seventh day of February, A. D. 1900.

[Seal United States District Court, Alaska.]

ALBERT D. ELLIOT, *Clerk,*
By J. J. ROGERS, *Deputy.*

Endorsed on cover: File No., 17,701. Alaska D. C. U. S. Term No., 240. The McKinley Creek Mining Company *et al.*, appellants, *vs.* The Alaska United Mining Company *et al.* Filed April 2nd, 1900.

Brief of Stockslager & Heard

Filed Mar. 13, 1901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

THE MCKINLEY CREEK MINING COMPANY ET., AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.

No. 240.

Appeal from the United States District Court for the District of Alaska.

BRIEF FOR APPELLANTS.

S. H. STOCKSLAGER.
GEO. C. HEARD,
Attorneys for Appellants.

ROBERT T. ELLIOTT, PRINTER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MCKINLEY CREEK MINING COMPANY ET., AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.
} No. 240.

Appeal from the United States District Court for the District of Alaska.

BRIEF FOR APPELLANTS.

Statement.

Peter Hall, William A. Chisholm, James Hansen, John Dalton and Dan Sutherland, partners under the firm name and style of the Alaska United Mining Company, on the 15th day of June, 1899, filed their bill in equity in the office of the clerk of the District Court of the United States for the District

of Alaska, presumably under section 500 of the Oregon Code, which code was made applicable to Alaska by the Act of May 17, 1884, against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, claiming to be the owners by right of prior discovery and location of two certain mining claims therein particularly described, situated on McKinley Creek in the District of Alaska; that being in peaceable possession of said mining claims developing the same, the defendants on the 10th day of June, 1899, setting up an adverse claim or title, forcibly entered upon said premises and attempted to drive plaintiffs therefrom by force and violence, and are still threatening by superior force and a breach of the peace if necessary, to forcibly take possession of said property, asking for an injunction, and that defendants be required to set forth the nature of their claim, and that upon a hearing, they be quieted in their title and possession and that their title be declared valid.

The Record does not show that any summons ever issued, but on the 21st day of June, 1899, the defendants filed their verified answer denying the allegations of plaintiff's bill and by way of cross-complaint claiming ownership by prior discovery and appropriation of both of said mining claims, and the right of possession; and setting up the additional fact that before summons issued in this case, said defendants had commenced in that court a suit at law in ejectment against the plaintiffs in

this action, to settle the right of possession and also for a restraining order against plaintiffs until such suit could be disposed of, and that summons duly issued thereon and was personally served June 22, 1899.

The plaintiffs thereupon, on the 22d day of June, 1899, filed their reply admitting they were in possession to the exclusion of the defendants and denying all other allegations.

Before the trial of the equity suit the defendants moved the court to try the ejectment suit first; and if not done, that the court confine the equity suit to the question of the application for injunction only.

This motion was overruled by the court and proper exceptions taken and allowed.

The defendants went to trial under protest, a jury was empannelled by order of the court, without objection from either side. Oral and record evidence was introduced, proper exceptions to evidence noted in the Record, and at the close of the evidence counsel for defendant moved the court to instruct the jury to return a verdict for the defendant, for the reason that the plaintiff had failed to prove the material allegations of the complaint, and for the further reasons that it appeared from the testimony that McConaghy and Hackley were the only qualified persons to hold the claims in controversy, and that they were the original discoverers of gold upon the claims, and that there is no evidence that either Hall or Chisholm or their agent, Cahoon, ever discovered any gold on either of the claims; that Hackley was upon the claim at all times from the

Hall, Chisholm, and Hawes, on October 6, 1898, all of said parties being residents of British Columbia and not citizens of the United States.

The defendant company claims under location made October 8, 1898, by Hackley of claim No. 1 and by McConaghy of claim No. 2, they being the claims in controversy.

Three principal errors committed by the trial court against the defendant are relied on to reverse the judgment below and are as follows:

First. The alleged locations relied on by plaintiff are utterly invalid because the same are not "distinctly marked on the ground," or otherwise designated as required by law; notwithstanding undisputed proof of such failure to mark said claim, the court refused to instruct the jury that such marking was essential to the validity of a mining location, hence left the jury to infer that such defective marking was sufficient.

Second. The fact is undisputed that Hackley, under whose locations defendant claims, made the first and only discovery of mineral on these claims prior to the attempted location by Cahoon, the attorney-in-fact, on October 6, 1898, Cahoon himself admitting that he made no discovery whatever prior to his attempted locations, but admits also that he based the locations made by him upon the discovery made by Hackley. On this point, the court erred in refusing defendant's instruction No. 8 (side page 344) declaring that a valid discovery of mineral was a prerequisite to a legal location,

and that priority of discovery gives priority of right against a naked location and possession without discovery.

Third. The answer of defendant expressly denies the citizenship of Hall and Chisholm, under whose locations made by their attorney-in-fact, Cahoon, the plaintiff claims. The power of attorney states they are citizens of British Columbia, and plaintiffs offered no evidence whatever to prove their citizenship at the trial. The court therefore erred in refusing defendant's instructions declaring that Hall and Chisholm being aliens and not citizens of the United States, the locations made under their power of attorney for their use were illegal and void.

We therefore beg leave to discuss these three points and cite authorities bearing thereon.

Plaintiff's Location Invalid.

I.

NO MARKING ON THE GROUND.

The Record leaves no question as to the manner in which Cahoon, the attorney-in-fact, attempted to locate these two claims. He having observed Hackley discover and extract gold from claim No. 1 on October 5, 1898, proceeded on the next day, the 6th, to post two notices on opposite sides of the same stump or snag, the one purporting to locate one claim up the creek from the stump in the name

of Hall, while the other purported to locate one claim down the creek from the stump in the name of Chisholm.

At page 50 of the Record Cahoon explains the whole transaction as follows:

> "The next morning we went back into the creek and was prospecting the creek, and I started to write a notice on a snag that was standing up in the creek, and I put on that snag, I, the undersigned, claim 1,500 feet, on one side, signed William A. Chisholm's name to it, and I wrote on the other side of the snag the same writing up the creek and signed Mr. Hall's name to it."

There is no pretense that plaintiff's location was otherwise marked than as above described. It is plain, therefore, that there was no such marking upon the ground as required by the statute (R. S., 2324), since the only act performed by Cahoon consisted in posting the two notices, which act is not required by the statute at all, and cannot be considered as a compliance with the law.

In view of these facts of record the court evidently greatly erred in refusing to properly instruct the jury as to this statutory requirement, observing which instruction the jury must have found plaintiff's alleged location invalid, hence not entitled to recover.

On the other hand, the instructions given for plaintiff and defendant ignore this defect entirely, and evidently misled the jury and left them to presume that plaintiff's locations were regular and valid, and that the only question for them to deter-

mine was which of the respective locations relied on by plaintiff and defendant was prior in point of time. This being a positive statutory requirement, a strict compliance with its provisions has always been held by the courts and the Land Department as essential to the validity of a location.

Lindley on Mines, one of the latest and best works on the subject, at section 371, thus states the rule:

> "The Revised Statutes of the United States contain the mandatory provision that the 'location must be distinctly marked on the ground so that its boundaries can be readily traced.' There is no escape from this requirement. While it is possible that State statutes or local regulations may particularize as to the character of the marking, they cannot dispense with the law of Congress. * * *
>
> "The requirement is an imperative and indispensable condition precedent of a valid location, and is not to be 'frittered away by construction.'"
>
> Citing Gleason *vs.* Martin White M. Co., 13 Nevada, 442.

The Mineral Law Digest, recently published by Clark and others, at page 78, states the rule as follows:

> "A location must be marked to be valid."
>
> Citing Newbill *vs.* Thurston, 65 Cal., 419; Phores *vs.* Muldoon, 75 Cal., 284; Newbauer *vs.* Woodman, 89 Cal., 310; Becker *vs.* Pugh, 9 Colo., 589, and 17 Colo., 243, and Gleeson *vs.* Martin White M. Co., 13 Nevada, 443.

The reasons for the statute and for its strict construction are so obvious that there should be no question about it.

In the case of Goun *vs.* Russell, 3 Mont., 358, the court, referring to this provision, says:

> "This section embodies one of the most ancient customs that has prevailed among miners."

Lindley on Mines, section 37, referring to this provision, says:

> "This was the rule under the Spanish and Mexican law. The object of the law requiring the locations to be marked on the ground is, to fix the claim, to prevent floating or swinging, so that those who, in good faith are looking for unoccupied ground, in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.
>
> Citing Patterson *vs.* Tarbell (Ore.), 37 Pac., 76; Gird *vs.* Cal. Oil C., 60 Fed. Rep., 531.

And in Faxon *vs.* Bernard, 2 McCrary, 44; 4 Fed. Rep., 70, it was said:

> "The Government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the Government and on the part of other citizens who may be asking the like bounty."

We have found no case decided by the courts or by the Land Department holding that acts such as those performed by Cahoon, consisting merely of writing a notice on either side of a snag, was a sufficient marking on the ground for the two locacations claimed. In fact, there was no attempt at all to mark the locations on the ground.

These locations were of placer claims and require the same strictness in marking on the ground as lode claims. The courts have held that notwithstanding the fact that where the lands are surveyed placer claims are required to be adjusted to the surveys, yet it is not sufficient marking in such a case, to post the claim as of the particular subdivision of the survey.

Anthony *vs.* Jelison, 83d Cal., 296.

In White *vs.* Lee 78 Cal., 593, it was held—

> "In locating placer claims by legal subdivisions, it is not sufficient merely to post a notice referring to the legal subdivision, but, it is necessary to mark the lines of the location."

In the case of Anthony *vs.* Jellison, *supra*, it was held—

> "Failure to mark the boundaries of the location is fatal to its validity. and the defect is not cured by the fact that the location notice gave the section numbers constituting the claim."

If then it is necessary to mark the location of a placer claim on the ground, in a case where the United States surveys have marked the section and

the subdivisional lines on the ground, where they might be found by any competent surveyor, how much more important is it to thus distinctly mark the location on the ground where there is no Government survey or any other method of ascertaining the exact location of the claim, than the marking made by the locator.

The following cases hold the attempted marking on the ground, in each case described, was not a sufficient compliance with the law.

In the case of Holland *vs.* Auburn Gold Quartz Mining Co., 53 Cal., 149, it was held—

> "The posting of a notice upon a tree at each end of a mining claim is not a sufficient compliance with R. S., 2324, which requires the location to be distinctly marked on the ground so that its boundaries can be readily traced."

In Jupiter *vs.* Bodie Con. Mining Co., decided by the U. S. Circuit Court, District of Cal., (11th Fed. Rep., 666) the court instructed the jury as follows:

> "Any marking on the ground claimed, by stakes and mounds, and written notices, whereby the boundaries of the claim can be readily traced, is sufficient. But there must be some such marking * * *
>
> "If the jury believe that before the location of plaintiffs thereon, it was actually and distinctly marked on the ground by stakes, notices, monuments and work, so that its boundaries could be readily traced, discovery made, etc., the location is valid."

In the case of Croceus M. & M. Co., *vs.* Smelting

Co., U. S. Circuit Court District of Colorado (19 Fed. Rep., 78) Judge Hallett held—

> "The statutes of Colorado afford no support to one who in locating his claim fails to set the proper stakes at the end of the claim when the proper position for them was not inaccessible, but merely difficult of access or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are properly set."

In the case of Book *vs.* Justice, U. S. Circuit Court (58 Fed. Rep., 107) Judge Hawley said:

> "The question as to the sufficiency of the marking of the boundaries depends to some extent upon the character and condition of the ground located. Where the location is made upon a comparatively barren hillside, the posting of stakes at each of the four corners, either by driving stakes in the ground, or building of stone monuments so as to keep the stakes in place is a sufficient compliance with the law."

In the case of Gelwich *vs.* Morarity (53 Cal., 217) it was held—

> "Placing a monument in the center of a claim and posting a notice thereon defining the claim, is not a compliance with the act, which requires locators to mark distinctly their locations on the ground so that the boundaries can be readily traced."

In the case of Newbill *vs.* Thurston (65 Cal., 419) it was held—

> "Erecting discovery monument and placing a notice on it claiming a certain number of feet

along the ledge in both directions is not a valid location of a mining claim under the act of Congress."

See also the cases of Golden Fleece, etc., *vs.* Cabel Con. Co., 58 Fed. Rep., 106; Gleeson *vs.* Mining Co., 13 Nev., 442; and Doe *vs.* Waterloo M. Co. 70 Fed. Rep., 455.

In the later case Judge Knowles speaking for the court said:

"There is a considerable space in the brief of the appellee devoted to maintaining that the notice and acts of Newbill were a sufficient location of the Red Jacket claim; that the one stake he placed upon the ground, claiming 500 feet one way and 1,000 feet in another way on the vein discovered, with 300 feet on each side of the same, was a sufficient marking of the boundaries thereof. In the location of quartz lodes, before the mineral act of 1872, such a mode of location was common. Since that date, I know of no instance in which such a location has been sustained. Since that date it has generally been held that in some way the location should be made in the form of a parallelogram, and the location so marked that the boundaries can be readily traced."

In the case at bar it is perfectly clear that Cahoon not only did not "mark the locations on the ground," as required by law and the decisions hereinbefore cited and quoted, but, that he did not intend to do so, he, himself, testifying that the pencil writing on each side of this old snag was intended only as temporary notices put up for the purpose, not of holding the ground as against Hackley, the discov-

erer of mineral, but of keeping strangers who might pass while they were doing further prospecting from seeing the gold Hackley discovered and attempting to locate the ground. His testimony also shows conclusively that he recognized the prior rights of Hackley, the first discoverer, who was still on the ground prospecting and at no time sought to take advantage of Hackley's labor and discovery. His whole conduct proves that he did not intend by his acts to make locations of the ground in controversy. He doubtless had in mind the laws of some of the States which provide for a temporary posting of notice under which time is given to prospect with a view to determining the course of a vein and the extent of the deposit, and of subsequently marking the location on the ground, or not, as might seem to him best.

But, be this as it may, from what was done by plaintiff's grantor it would be impossible for an expert surveyor even, let alone the ordinary miner, to determine the location of the lines of the claims in controversy.

At page 52 of the Record said grantor and locator, Cahoon, was asked to state as plainly as he could just what was written by him on the snag, and his answer was—

> "I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side."

Now, in the first place, "this creek" was not named at that time, but was subsequently named McKinley creek by Hackley (Record, p. 78).

A surveyor could not have located the creek from this description, and if the creek had been pointed out to him, he could not have laid down the lines from the description on the snag. How could he have determined whether the center of the creek with its meanderings should be the middle of the claim or whether, to follow the exact language of the notice, it should extend 300 feet on either side of the creek? But, we submit, that even if one competent to survey and measure distances from the notice could have determined the exact locus of the claims, it would not be in any sense a compliance with the law. The law does not require the prospector to hire a surveyor to locate the lines and corners of prior locations. That duty is specifically required by law of every locator. He must *distinctly* mark the location on the ground so that the lines may be *readily* traced, not by the use of a surveyor's chain and compass, but by any one who has eyes to see such distinct marking.

In this case there can be no doubt, we think, but that if the trial judge had properly instructed the jury as to the positive statutory requirement of so distinctly marking the locations on the ground as that their boundaries could be readily traced, and that a failure to do so was fatal to the locations of plaintiff's grantor, in the face of the subsequent locations by Hackley and McConaghy, the original discoverers, the verdict would have been for the defendant, and for this reason the decision should be reversed.

Now, in addition to the objection above pointed out, plaintiffs base their priority of right upon the

locations made by Cahoon on October 6th in favor of Hall and Chisholm; but by reference to page 174 of the Record *et seq.* it clearly appears that plaintiff's case rests not on the location notices posted by Cahoon on the snag, as the location notices introduced at the trial by Hall and Chisholm are signed by them respectively and not by Cahoon. It is not pretended by Hall and Chisholm that these location notices are exact or real copies of those posted by Cahoon, and as shown by comparison with Cahoon's testimony as to what he wrote in the notices posted by him, they are totally different in both form and substance, for it cannot be disputed that the notices posted by Cahoon were wholly indefinite and uncertain, while the pretended copies were no doubt constructed on the 20th of October, two weeks after Cahoon's attempt, when Hall and Chisholm claim to have returned and posted the notices offered in evidence.

It appearing, therefore, that the location notices offered by Hall and Chisholm in evidence were not only not the notices posted by Cahoon, but not even copies thereof, nor signed by him, it must be held that they have no legal connection or relation to the pretended locations made by Cahoon; and as they were not posted or signed by Hall and Chisholm until the 20th of October, the prior locations made by Hackley and McConaghy, October 8, must prevail. We call attention to the refusal of the court to sustain defendant's objections to the introduction of these pretended notices of location in evidence, their introduction and consideration by the jury, and the exceptions saved to the ruling

of the court by counsel for defendant. See pages 174, 175, 176, and 177 of the Record.

II.

No Discovery of Mineral.

But, aside from the utter failure of plaintiff's grantor to mark the locations upon the ground as required by the law, there is another fatal defect in them.

There was no discovery of mineral by Cahoon upon the ground prior to his posting the notices hereinbefore described. Upon this point also the trial court committed a fatal error in refusing to give instruction numbered eight (8) asked by the defendant, which is as follows:

> "I also instruct you that there is something more required to make a good location of a placer mining claim than the mere putting up of stakes and the making of proper location notices in writing, and filing the same. In order to make a good and sufficient location in the eyes of the law, it requires discovery of precious metals upon the claim, and also appropriation of the land embraced in such notice. A location can rest only upon the actual discovery of precious metal (in this case gold). Such discovery must precede the location or be in advance of intervening rights. Priority of discovery gives priority of right against naked location and possession without discovery. So in this case, gentlemen of the jury, if you find that the location made by Cahoon of the two claims in controversy was made without the said Cahoon's prior thereto dis-

covering precious metal or gold, and that said location was in every respect legal, excepting the discovery of precious metal upon the premises, and that Hackley and McConaghy found upon their respective claims and discovered gold and made a subsequent location to that of Hall and Chisholm, and that the said Hackley and McConaghy were the original discoverers of gold upon the said claim or discovered before the said Cahoon or the said Hall or Chisholm, then the location of the said claim by Hackley and McConaghy is a better location than that of Hall and Chisholm, although Hackley and McConaghy's location of said claims may be subsequent in date to that of Cahoon; and if you find said facts in favor of Hackley and McConaghy, then you should find a verdict for the defendant company" (Record, p. 191).

This instruction, as shown by the Record, the court refused to give, and the only instructions given the jury upon this point are instruction No. 1 given on behalf of the plaintiff as follows:

"Gentlemen of the jury, you are instructed that on the 6th day of October the ground in controversy in this suit belonged to the United States and was open to location as mining claims." * * *

And instruction No. 5, given on behalf of plaintiff, which is as follows:

"Now, much has been said by counsel as to a preliminary location and as to the time a man has to explore his premises before another man has a right to locate, because it is contended on one side that Hackley was the discoverer, and on the other side that Sutherland

was, and on that point of discovery I instruct you that any of these persons, if they saw or extracted or failed to extract, but saw being extracted any precious metals, it is a sufficient discovery to authorize him or them to make a location; so I say any of these persons, if they saw gold taken from the ground, that they are discoverers in the sense that authorizes a man to locate" (Record, pp. 142, 143).

We insist that the instruction asked by the defendant is a succint and accurate statement of the law applicable to the evidence in this case.

Three paragraphs in said instructions so asked cover the law upon this point. These are:

(1) "A location can rest only upon the actual discovery of precious metals.

(2) "Such a discovery must precede the location or be in advance of intervening rights.

(3) Priority of discovery gives priority of right against naked location and possession without discovery."

As to the necessity for a discovery prior to location the statute is, if possible, even more explicit than as to the marking on the ground for, as will be seen from the language of the act, locations are *absolutely prohibited* until the discovery of a vein or lode within the limits of the claim located (Sec. 2320, R. S.) It follows that a location made prior to discovery by the locator is unlawful and void.

In the case of King *vs.* Amy, etc., (152 U. S., 222), this court said:

"A location can only rest upon an actual discovery of a vein or lode."

Lindley on Mines, section 335, states the requirement thus:

"Such discovery must precede the location, or be in advance of intervening rights."

The author cites a number of decisions of the Supreme Courts of the various States in support of the text.

Barringer and Adams on the Law of Mines, page 214, refer to this statutory requirement as follows:

"No right can be acquired by location before discovery."

See also to the same effect—

North Noonday M. Co. *vs.* Orient M. Co., First Fed., 522; 6 Sawyer, 299.
Jupiter M. Co. *vs.* Bodie C. M. Co., 11 Fed., 66.
Chesman *vs.* Shreves, 40 Fed., 787.
McLaughlin *vs.* Thompson, 29 Pac., 816.
Burke *vs.* McDonald, 33 Pac., 49.

The Land Department has uniformly held that discovery must precede location. In the case of Etling, *et. al. vs.* Potter (17 L. D., 424) Secretary Smith said:

"It will be seen that there is no competent evidence to show that the claims were ever located. When the witness says he has located a mining claim, he is simply stating a legal conclusion. *A location must be made on a discovery of mineral.*"

To the same effect are the cases of Southern Pacific R. R. Co. *vs.* Marshall (17 L. D., 545) and Castle *vs.* Womble (19 L. D., 455). In the latter case Secretary Smith said:

> "The law is emphatic in declaring that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' (Revised Stat., 2320.) This is a prerequisite to the location, and, of course, entry of any mining claim. Without compliance with this essential requirement of the law no location will be recognized and no entry allowed."

In the case of Wilson Creek M. M. Co. *vs.* Montgomery (23 L. D., 476), Secretary Francis, referring to the decision of Noyes *vs.* Mantle (127 U. S., 348), said:

> "The location which when duly recorded the court held to be constructive notice of the existence of a vein or lode, was one 'made under the law' and meeting, at the time, all the requirements of the law—that is, among other things, one made after the discovery within its limits of a valuable vein or lode (Sec. 2320 R. S.), * * *
>
> "The proposition that any recorded notice of a so-called lode location is conclusive presumption of the existence of a valuable lode or vein within its limits, as would seem to be the contention of this motion needs, it would seem, in view of the law and the history of mining claims and operations, only to be stated to be refuted."

These authorities fully support the instruction asked by defendant to the effect that discovery must precede location or be in advance of intervening rights. The other paragraphs of the instruction asked last above quoted are also in accordance with reason and justice, in harmony with the whole spirit of the mining law and regulations, and supported by the decisions of the Land Department and the courts. That priority of discovery should give priority of right against naked location and possession without discovery is certainly sound law as well as simple justice to the discoverer, provided he has not abandoned the claim. It follows, therefore, that the instruction of the court to the effect that if Cahoon or any of the other parties saw Hackley discover gold upon the claim they could make a valid location without any regard whatever to his rights as a discoverer, is not the law, and must have misled the jury as to the validity of the locations of plaintiff's grantor. While it might be admitted that as an abstract proposition of law the statement that seeing others discover gold or other precious metals would be sufficient discovery upon which to base a location so far as the United States are concerned and as against all others, *except the discoverer or discoverers*, is sound and proper, but because of this exception, the instruction of the court was clearly inapplicable to the case on trial, and the error is just as fatal to plaintiff's case as if the instruction had not embodied a correct principle of law as applied to a case where no one was claiming any adverse rights as a prior discoverer.

In the case of Winter Lode (22d L. D., 362), Acting Secretary Reynolds said:

> "The statute itself and all decisions of the Department and the courts make the discovery of mineral a prerequisite to the location of a mining claim, and the discovery must be upon land *open to exploration not claimed or located by any other person.*"

This decision states the law governing cases like the one at bar, and supports the contention of defendant's counsel and the correctness of the instruction asked by the defendant, as well as showing the error committed by the court in the instruction given, which ignored entirely the rights of Hackley, the discoverer, who was on the ground protesting against the locations at the time they were made, and who, two days thereafter, located the same ground.

The statement of the court in its charge to the jury that it was claimed on the one hand that Sutherland made the first discovery, and on the other side that Hackley made it, was also misleading to the jury.

But we do not think it is at all material to the case, for the reason that it is perfectly clear Sutherland either recognized Hackley's right as the first discoverer, or he regarded his discovery as not of sufficient value or importance to justify the making of a location on it, for it is conceded that he went higher up the creek than either of the claims in controversy and made his own location, claiming no right whatever by reason of any pre-

tended discovery made by him upon either of these claims. In fact, it is not definitely shown that Sutherland's pretended discovery was upon either of the claims in controversy.

Again, Cahoon did not claim to have made the locations upon any discovery other than that made by Hackley, as shown by his very full testimony upon that point at page 50, Record.

It is thus made clearly apparent that this charge of the court was erroneous, not applicable to the case, and misleading to the jury.

Exclusive Rights of the Discoverer.

Another charge of the court, numbered 6, given by the court on behalf of the plaintiff, is equally erroneous and likewise misleading to the jury. It is as follows:

> "Now, just a word as to the time a man has after discovery before he must take steps to locate: It must be a reasonable time; a man cannot discover gold in one place and hold the whole world at bay while he explores the whole creek; he must act promptly; it is the policy of the law to allow to the thrifty the benefit of their energy, and it is often the experience that the discoverer does not get the best claims; he must make up his mind within a reasonable time, and it is a question of fact for the jury, and he is not permitted to hold the whole district until such time as he may determine which claim he desires to locate" (Record, p. 143.)

Now, the undisputed facts are, that Hackley discovered gold between 4 and 5 o'clock on the even-

ing of October 5, and that immediately thereafter all of the members of the party left the ground, went out on the benches of the creek and camped together for the night; that they all returned to the ground early next morning and Hackley commenced further prospecting on the ground where he had discovered the gold late the evening before; that very soon thereafter Cahoon commenced writing the notices on the snag near the creek and Hackley protested, he claiming the ground on account of his prior discovery; that Cahoon admitted that he had no right to the ground, and claimed none, but put up the temporary notices, as he swore, to keep others off and agreed to remove them thereafter. It also appears that Hackley, accompanied by Sutherland and Hand, continued their prospecting, got separated from the other members of the party and did not return to the camp on the benches of the creek until some time the next day; that on the 8th, which was the next day thereafter, he and McConaghy made location of the two claims in controversy, McConaghy in the mean time having made discovery on the claim located by him.

These undisputed facts show with what diligence Hackley followed up his discovery and also the action of Cahoon in attempting to locate the claims upon Hackley's discovery at the very first opportunity after the discovery was made.

Did any of these facts justify the direct and unmistakable inference of the court in his charge that Hackley was trying to hold the whole creek and keep the whole world at bay for an indefinite

time? If they do not, then the charge is erroneous. There is no pretense that Hackley ever made or attempted to make any other location than the one based upon his original discovery.

What are the rights of a discoverer and what exclusive right has he to make location upon his discovery, and if he has such right, within what time must he exercise it?

The charge of the Court taken as a whole is clearly to the effect that the discoverer has no exclusive right for any length of time whatever, but that any one who saw the discovery made, or who saw the mineral after it was discovered, could make a valid location at once and thereby deprive the discoverer of any right to make a subsequent location. In other words, that any such subsequent location by the original discoverer would be void.

The court also seemed to have been determined that the jury should not misunderstand his view of the law upon this point, for, as we have seen, he instructed the jury that although the mineral had been discovered late on the evening of the 5th, and Cahoon, who did not make the discovery, or make any claim whatever to have done so, but based his action entirely upon the discovery made by Hackley, had a right to make said locations, because, as he stated in the charge, the land at the time Cahoon undertook to make said location was "open to location as mining claim".

We have, then, this proposition, plainly and unmistakably put viz., Can a discoverer of mineral, who makes his discovery late in the evening, and who must leave the ground to camp for the night,

be deprived of all right to make location based on such discovery, if not made prior to an early hour the next day?

Lindley on Mines, section 339, thus states the rule upon this point:

> "When a prospector has made such a discovery as will satisfy the law and form the basis of the location, he is allowed, in most of the States and Territories, a specified time in which to perform the remaining acts which are requisite to perfect the location. As to whether, in the absence of such legislation and district rules, the discoverer has any appreciable time within which to mark his boundaries and complete his location is a subject upon which the courts differ.
>
> "The Supreme Court of California holds that while, if the locater be on the ground actually engaged in making the location, another could not locate over him, yet in the absence of local rules authorizing it, no time is allowed to perfect the location; that until it is actually marked on the ground the claim is not appropriated so as to prevent its acquisition by a subsequent locator.
>
> "The Circuit Court of Appeals for the eighth circuit was called upon to determine the question upon the same evidence and the same state of facts arising in one of the California cases (Newbill *vs.* Thurston, 69 Cal., 419), and that tribunal declined to accept the rule announced by the California courts. The Court of Appeals held, that after discovery and posting a notice thereof, the locator had a reasonable time in which to complete the location; that what was a reasonable time would depend upon the facts of each particular case; that evidence

of customs prevalent in other localities on this subject might be received for the purpose of aiding the court in its determination, and that, under the circumstances of that case, twenty days was a reasonable time. (Doe *vs.* Waterloo M. Co., 70 Fed. Rep., 455, affirming the decision of Judge Ross in same case, 55 Fed. Rep., 11.)

"The doctrine announced by the Circuit Court of Appeals is in consonance with the views expressed by the Supreme Courts of Nevada and Idaho and in accord with the spirit of the law as interpreted by the Supreme Court of Colorado and the Supreme Court of the United States.

12 Nev., 312.
13 Nev., 442.
2d Idaho, 646.
2d Colo., 300.
3 Colo., 533.
Erhardt *vs.* Boraro, 113 U. S., 527.

"To hold that a miner as soon as he discovers a lode must immediately stake the territory which he is entitled to claim, in order to protect it from invasion and claims of other persons, would be an unreasonable if not an impossible requirement.

Omar *vs.* Soper, 11 Colo., 380. * * *

"Whenever preliminary work is required to define and describe the claim located, *the first discoverer must be protected in the possession of his claim until sufficient excavation and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal.* Otherwise the whole purpose of allowing the

free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession instead of previous discovery would determine the rights of the claimants."

Erhardt, Boraro, *supra.*

Marshall *vs.* Harney Peake Tin M. Co., 1 S. D., 350.

Omar *vs.* Soper, *supra.*

The last two paragraphs are quotations from the decision of the court in the case of Erhardt *vs.* Boraro, and the law as stated therein is so applicable to the case at bar that it seems to us it is decisive of this case. If the first discoverer *must* be *protected* until he can make such excavation and developments as may be necessary to disclose whether the vein is of such richness as to justify the work of extracting the metal, how can it be said that other parties who made no discovery could invade Hackley's ground without giving him a single hour of daylight to make excavations and explorations?

Barringer & Adams on the Law of Mines and Mining, at page 197, thus state the law:

"One in actual possession of Mining ground who has discovered and uncovered the lode, but has failed to take the other steps required by law to complete his location cannot be ousted by a subsequent discoverer from the ground actually held by him. A location cannot be extended over a senior discovery in the actual possession of another. Citing, Faxon *vs.* Barnard, 2 McCrary 44—4 Fed. Rep., 702.

In the case last above cited it was held—

> "If the first discoverer is shown to have been on the ground before the time when the second discoverer attempted to make his location, it is for the latter to show that the first discoverer had given up his possession." Citing Lebanon M. Co. *vs.* Cons. Repub. M. Co. 6 Colo., 371.

We are satisfied the foregoing cited and quoted authorities state the law correctly as applied to this case, where no State laws or district regulations existed, and we must look to the Statutes of the United States alone to determine the question involved. And applying the doctrine so held to the case, it must be clear that the charges given by the court are not the law, and must have misled the jury.

It is not disputed that as soon as it was light enough for the parties to see on the morning of the 6th of October, following the discovery made at 4 or 5 o'clock the evening before, after breakfasting, they all went upon the premises in dispute; that Hackley was on the ground prospecting it when Cahoon attempted to post the notices relied on by plaintiff; that he protested and objected as shown by the testimony of Cahoon, who, upon cross-examination in answer to the question whether Hackley made same objection to notice posted on the other side of snag, said:

> "I couldn't say as to that. I don't see how he could raise any more objection than he did." (Record, p. 70.)

This testimony is undisputed. That Hackley was actually present on the ground claiming it because of his prior discovery and protesting against the action of Cahoon when he attempted to post up the notices upon which plaintiff's case rests is fully shown by the evidence and will not be disputed. That the errors committed by the trial court in giving the instructions hereintofore set out and in refusing to give that asked by the defendant, are directly responsible for the verdict of the jury against the defendant must be apparent.

Unless the court shall hold that the man who discovers mineral late in the evening must proceed to locate the ground that night in order to protect him from the invasion of others, who saw him make the discovery, then it must be held the court committed fatal errors at the trial of the cause, for which the judgment rendered should be reversed.

III.

Location by Alien Void.

But, even though there had been a proper discovery by plaintiff's grantor and he had marked the boundaries of the claim according to law, the locations were made by a person prohibited by law from either exploring, occupying, or purchasing the mineral lands of the United States, he being an alien.

This question was distinctly raised, not only as to the locator, but as to each and all of the persons constituting the plaintiff partnership by the first

paragraph of the defendant's answer to plaintiff's complaint (Record, p. 146).

It was also raised and the point saved by proper exceptions, as to Hall and Chisholm, by the following instruction asked by the defendant and refused by the court, as well as by the instruction given as follows:

> "The court also erred in not giving the following instruction, which was asked by the defendants and refused by the court: 'I also instruct you that in order for the plaintiff to recover it must be proven that Hall and Chisholm were at the time they located and took up their respective claims citizens of the United States' for the reason that it was an issue in the case made by the pleadings, and it was necessary under the circumstances to be proven, and the court, on the contrary, instructed the jury as follows, which was excepted to by the defendants, and exception allowed, to wit: 'The instructions which I have read you cover the law features of this case pretty completely. The question of the citizenship of the plaintiffs has been raised by counsel in their argument, and I charge you, that the citizenship of either the plaintiff or the defendant in this case is not an issue of fact to be determined by you at all; it is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States, the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man against another cannot question the citizenship of either. If you apply for a patent the United States has a right to question the citizenship, because the purpose is to get a

> title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens that could be only taken advantage of by the Federal Government;' which said last instruction is against the law and the issues made up by the pleadings in this case, for in the complaint it is alleged that Hall and Chisholm attempted to locate the claims in controversy and that said allegation is denied by the defendants in their answer."

Thus the question is fairly presented whether it is necessary in an action such as the one at bar, based upon locations of the public mineral lands, and against locators who are citizens and claiming title under their locations, to allege and when denied, prove, that the plaintiffs are citizens? Or, if not necessary to prove plaintiffs are citizens, is it necessary in such cases to prove the locators were, at the date of their locations, or prior to the attaching of the defendants' claim, citizens of the United States, or aliens having declared their intention to become such?

Evidently counsel who prepared the pleadings for the plaintiff was of opinion it was necessary to plead the citizenship of plaintiffs, as he made such allegation in the complaint, and that it was specifically denied by defendant's counsel shows it was so regarded by them. But the court did not consider it important that either the locator or their grantees, the plaintiff, should establish such qualification, and he so instructed the jury. Is that the law?

The whole question, and the view taken of it by

the court, is succinctly stated in the charge given, wherein he says:

> "It is not necessary for me to instruct you whether it is necessary for either the plaintiff or the defendant to be a citizen of the United States, the law unquestionably is that the question of citizenship can only be raised by the United States Government, and one man against another cannot question the citizenship of either. If you apply for a patent the United States has a right to question the citizenship because the purpose is to get a title. In other words, if there has been a law in this district prohibiting the location of mining claims by aliens that could be only taken advantage of by the Federal Government."

This view of the law is doubtless based upon some of the decisions of this court, notably that of Manual *vs.* Wolf, 152 U. S., p. 505.

But we do not think the doctrine enunciated in these decisions is applicable to the case at bar.

If it be conceded, which we do not do, that an alien could, in the teeth of the statute, explore, occupy, or locate mining claims, and that no one could bring an action against him to oust him of this possession, except the United States, yet, that would not affect the question in this case, for the reason that in this case these aliens bring an action under section 500 of the Oregon Code against citizens who have connected themselves with the title of the Government, for the quieting of their *title* and the enjoining of the defendants from interfering with them. In order to maintain such action they must show their *right* to the exclusive posses-

sion of the ground in dispute. Hence, they aver in their complaint their citizenship which, as we have seen, was specifically denied by defendants.

The construction of this section of the Oregon Code, and of similar statutes in other States, is uniform, to the effect that the plaintiff, in order to succeed, *must show that his possession is lawful.*

Fishenor *vs.* Knapp, 6 Ore., 205.
Murphy *vs.* Sears and Holman, 11 Ore., 127.
San Francisco *vs.* Ellis, 54 Cal., 72.
Stark *vs.* Starr, 6 Wall., 410.
Holland *vs.* Challin, 110 U. S., 595.
Frost *vs.* Spitley, 121 U. S., 552.

"To sustain jurisdiction in equity, on a bill to quiet title, there must be clear evidence of title."
Smith *vs.* Bourman, 13 Cal., 107.
Citing Trustees of Louisville *vs.* Gray, 1 Littell, 147.
Morton *vs.* Beaser, 2 Ohio, 495.

Now, here are aliens invoking the aid of the court to protect them in maintaining a right which the statute specifically prohibits them from holding. It is not a question whether some one other than the United States can raise the question of their right, but rather whether they have a right to go into a court of the United States and raise a question as to the title of the defendants who are citizens without first showing their own possession is *lawful.*

The case of Stark *vs.* Starr, *supra*, was an action

brought under this section of the Oregon Code and Justice Field, in that case said:

> "His possession must be accompanied with a claim of right; that is, must be founded upon title, legal or equitable, and such claim or title *must* be exhibited in the proofs, and perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

From these authorities it is clear that the plaintiff in the case should have been required to make out a clear case of the *right* or *lawfulness* of its possession. In order to do this the averments of the complaint as to citizenship was an essential part of the case and defendants motion for non suit at the close of the evidence, specifically setting forth this as one of the grounds therefor, should have been sustained. Since, under the provisions of the statute neither the members of plaintiff, partners, nor the locators, were permitted to acquire any right to mineral land, it not being open to exploration, occupation, or purchase by them, it was impossible for them to show plaintiff's possession under these attempted locations was "lawful" as they are required to do in order to recover in this action.

Barringer & Adams on Mines and Mining at 202, say:

> "*A location by an alien is void.* But it may be validated by subsequent naturalization, in which case the location will date from the declaration of intention and not from the mak-

ing of the location. It follows, therefore, that work done previously to the declaration of intention will inure to the benefit of the locators, but will not cut out intervening rights. * * *

"The *fact of citizenship* is an essential to the validity of the location, *and must be affirmatively proved by one who alleges a location*, and its decision is a question for the jury."

This seems to be a clear and correct statement of the law. It is in harmony with the statute and we think supported by authority.

A location by an alien is void, but may be validated by naturalization, if done prior to the intervention of adverse rights.

Citizenship is essential to the validity of a location and must be affirmatively proved by one who alleges a location.

The Supreme Court of Idaho in the case of Bohannon *vs.* Howe, (2 Idaho 417, 17 Pac. 583) held:

"In an action for trespass upon mining ground when the legal title is in the United States and the plaintiff's right is founded on a possessory title, *he must allege and prove his citizenship.*"

In the case of Wilson *vs.* Triumph Con. M. Co. (56 Pac., 300), the Supreme Court of Utah held:

"A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention to become a citizen, if relocation be made without force or violence, and prior to declaration of intention or conveyance to a citizen. As against an intruder pos-

session is *prima facia* evidence of right to possession, but as against one connecting himself with the Government title, mere occupancy must yield to the higher right." Citing Sparks *vs.* Pierce, 115 U. S., 408, and Brandt *vs.* Wheaton, 52 Cal., 480.

To the same effect is the case of Golden Fleece Gold etc. Co. *vs.* Cabel Cons. Gold etc. Min. Co., 12 Nev., 312.

II.

Power of Attorney and Acts Thereunder.

Cahoon, the attorney-in-fact under the power of attorney introduced in evidence by the plaintiff, (Record p. 3) had no right or power to make the locations in controversy in this case.

That instrument authorized him to make *one joint location* for Hall, Chisholm, and Hawes, and nothing else.

The language used by the parties in conferring such power, is plain and unambiguous, and hence does not require any construction.

It follows that his acts in posting notices on these claims, one for Hall, individually, and another for Chisholm, individually, were wholly unauthorized and for this reason are illegal and void.

He was authorized to locate but one joint claim for the three parties executing the instrument.

The language used by the parties conferring the power is plain and unambiguous and its construc-

tion must follow the plain import of the language used. It must be strictly construed.

Bosseau *vs.* O'Brien, 4 Bliss, 395.
Brantly *vs.* Southern Life Ins. Co., 53 Ala., 554.
Johnson *vs.* Wright 6, Calf., 373.
Golinsty *vs.* Allison, 114 Calif., 458.
Chase *vs.* Dana, 44 Ill., 262.
Wood *vs.* Goodbridge 6, Cush., 123.
Gilbert *vs.* Howe, 45 Minn., 121.
Mechanics Bank *vs.* Schaunbreau, 38 Mo. 228.
Craighard *vs.* Peterson, 72 N. Y., 284, 28 Am. Rep. 150.

"The authority of an agent under a written instrument is limited to the plain import of the language of the instrument."

Wynne *vs.* Parke, 89 Texas 413, 34 S.W. 907.

The court instructed the jury to the effect, that after Cahoon had made a location his agency was at an end, that he could not change it, and that any attempt to do so, was invalid unless ratified by the principals.

But, the court again utterly failed to instruct the jury as to *what acts were necessary to constitute a valid location* but left the jury to infer this posting was sufficient.

This instruction was given to apply to the testimony introduced to show that Hall and Chisholm had ratified the acts of Cahoon in subsequently making the two locations he made for them, and which, are not in controversy in this case.

If we are right in our position that the acts of Cahoon, as to the claims in controversy not being

required by law, and that he did not take a single step required by law as to these claims to make a valid location; and in addition positively and specifically swore he did not intend such acts to be a location, then the charge of the court as to abandoning these locations and making others, and as to the invalidity of these latter locations, unless ratified, is immaterial and tended to mislead the jury.

Therefore defendant insists:

First. That plaintiff has failed to show any legal title to the property in controversy under its alleged locations or otherwise.

Second. It being admitted by the Record that neither the original locators, the defendant company nor any of its members are citizens of the United States, but aliens, plaintiff thereby fails to show or prove such legal interest or title in the premises as will sustain its action against the defendant.

Wherefore defendant prays that the judgment of the lower court be in all things reversed and set aside; and that the defendant's prior right and title to the premises in controversy be sustained and decreed, and all other relief as prayed by defendants' cross-bill as shall be found just and proper.

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Geo. C. Heard,
Attorneys for Appellants.

Washington, D. C.

Supreme Court of the United States.

October Term, 1908.

McKINLEY CREEK MINING COMPANY et al., *Appellants*,

vs.

THE ALASKA UNITED MINING COMPANY et al.

No. 87.

Appeal from the United States District Court for the District of Alaska.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

McKINLEY CREEK MINING COMPANY *et al.*, *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY *et al.*
} No. 37.

Appeal from the United States District Court for the District of Alaska.

Supplemental Brief for Appellants.

The above-entitled cause having been argued and submitted to the Court at the October term, 1900, the Court, on the 28th day of October, 1901, handed down the following request:

> "Counsel are requested to file briefs on the question as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a case of this character, are open for consideration on appeal from the District Court of Alaska."

In compliance with this request, we beg to submit the following points and authorities:

Act of May 17, 1884.

By the Act of May 17, 1884 (23 Stat., 24), the District Court of Alaska was established and was given the jurisdiction of district courts of the United States, district courts exercising circuit court powers, and also general law and equity jurisdiction. (McAllister *vs.* The United States, 141 U. S., 174; *Ex parte* Cooper, 143 U. S., 472, citing Durousseau *vs.* The United States, 6 Cranch, 307.)

By section 7 of the same act the final judgments and decrees of said court are reviewable by the Supreme Court of the United States "as in other cases."

The terms "as in other cases" necessarily refer to the procedure for review provided by sections 691 and 692, Revised Statutes, governing district and circuit courts having like jurisdiction; section 691 applying expressly to judgments in common law actions, and section 692 to decrees in equity, admiralty, and maritime cases. Under the former, section 691, such judgments can only be reviewed on writs of error, and under the latter, section 692, decrees in equity are to be reviewed alone on appeal, by which the entire record is brought up for consideration.

This action was commenced by the appellees on the equity side of the court under section 500 of the general laws of Oregon, which reads as follows:

> "Any person in possession by himself or his tenant of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest."

This statute upon its face shows that any proceeding under it must be an equitable proceeding, and the record shows that this case was so treated by the lower court in refusing to fix the amount of stay bond, in order that the defendant might, pending the appeal to this Court, remain in possession of the property, giving as one of the reasons "that the cause was tried as an equity one and on the equity side of the said district court." (Record, p. 205.)

It also appears that appellees in their bill asked for, and the court granted, upon the final hearing a perpetual injunction against the appellants.

If anything further were necessary to fix the character of an action under this section of the Oregon Code, as being distinctly a proceeding in equity, the decision of this Court announced by Mr. Justice Field in the case of Stark *vs.* Starr, 73 U. S. (6 Wall., 402), might be cited.

This, then, being an equity case it is properly brought to this Court by appeal under section 692, Revised Statutes. The distinction between an appeal and a writ of error and the questions which each present for review was clearly stated by Chief Justice Ellsworth in Wiscart *vs.* Dauchy, 3 Dall., 321, as follows:

> "An appeal is a process of civil law origin, and removes the cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."

This view is adopted in the case of The United States *vs.* Goodwin, 7 Cranch, 108.

This Court also holds in many cases that final decrees rendered by circuit courts in equity, admiralty, and maritime cases are removable to the Supreme Court only by appeal, where they are reviewable both as to law and the facts. (The Baltimore, 8 Wall., 377; Gruner *vs.* The United States, 11 Howe, 163; Merrill *vs.* Petty, 16 Wall., 338; The Alicia, 7 Wall., 571; Walker *vs.* Dreville, 12 Wall., 440; McCullum *vs.* Eagur, 2 Howe, 61; Sampson *vs.* Welsh, 24 How., 207.)

Section 698, Revised Statutes, also provides that—

> "Upon the appeal of any cause in equity or admiralty or maritime jurisdiction, or of prize or no prize, a transcript of the record as directed by law to be made and of copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal shall be transmitted to the Supreme Court."

In *ex parte* Cooper, *supra*, this Court held that under this statute, "on appeal all questions properly presented are open to determination."

It would seem, therefore, from the foregoing statutes and authorities applying to appeals in

equity cases that all the rulings on the trial of the cause, as well as the giving and refusing of instructions to the jury called to pass upon questions of facts, when properly excepted to and made part of the record, are open to consideration on appeal to this Court.

Act of April 7, 1874.

The Act of April 7, 1874 (18 Stat., 27), prescribing how appeals and writs of error from territorial courts are to be taken to the Supreme Court for review does not seem to be applicable to the District of Alaska, but was intended to apply only to the then *organized territories*, as appears from an examination of the preamble of said act, which is as follows:

> "Whereas, by the organic acts establishing several of the territories of the United States, it is provided that certain courts thereof shall have common law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively."

The terms also of the act would seem to exclude Alaska for the following reasons:

First. By its terms it applies to the then "organized territories," and purports to provide a uniform method of obtaining reviews of decisions of the courts of such territories.

Second. It does not seem to apply to Alaska because Alaska was not only not an organized territory, but at that time, and for more than ten years thereafter, had no court at all, or semblance of territorial organization.

Third. At the date of the act Alaska had neither "organic act" nor local legislature which might have "adopted a code of rules of practice," as was recited to have been the case in the several territories referred to in the preamble; but, on the contrary, all the legislation for Alaska has been enacted by Congress.

Fourth. The second paragraph of the act providing a uniform method of obtaining a review of judgments or decrees of said courts expressly applies to "said territorial courts" mentioned in the preamble, viz., in the several territories then organized.

This Court in the Coquitlan case (163 U. S., 346) defines the District Court of Alaska as the supreme court of a territory within the meaning of the Court of Appeals Act of March 3, 1891 (26 Stat., 826), for purposes of appellant jurisdiction, but nothing in that decision can be held to have construed the Territorial Act of 1874, *supra*, as applying to Alaska, nor did the Act of 1891 under

consideration in that decision amend or change the former act in its special application to the courts of organized territories and procedure for review of their decisions by this Court.

We conclude, therefore, that appeal was the proper method whereby to bring the entire record of the case under consideration before this Court for review, "as in other cases," referred to in section 7 of the Alaska Act of May 17, 1884, viz., Revised Statutes, section 692, and decisions cited, *supra*, defining the proper practice for bringing up equity cases by appeal for review by this Court; and on such appeal, as held in *ex parte* Cooper, *supra*, "all questions properly presented are open to determination."

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No. 37

FILED
APR 12 1901
JAMES H. MCKENNEY

Brf. of Dudley & Michener

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 12, 1901.

THE MCKINLEY CREEK MINING COMPANY ET. AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.
No. 240.

Appeal from the District Court of the United States for the District of Alaska.

BRIEF FOR APPELLEES.

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BYRON S. ELLIOTT PRINTING CO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MCKINLEY CREEK MINING COMPANY ET. AL. *Appellants*,
vs.
THE ALASKA UNITED MINING COMPANY ET. AL.
No. 240.

Appeal from the District Court of the United States for the District of Alaska.

BRIEF FOR APPELLEES.

I.

The Pleadings.

The appellees sued the appellants to enjoin them from attempting to work the placer mines in controversy, and from interfering with the appellees

in their possession, use and development thereof, and to quiet the title and possession thereof in the appellees. Pp. 143–146.

Appellants answered in denial, pp. 146–148, and filed a cross-complaint alleging ownership by them, ouster of possession by appellees, and they prayed an injunction. Pp. 148–152.

The appellees replied denying the allegations of the answer and cross-complaint. Pp. 152–155.

Evidently this suit was brought under the Oregon Code, which is as follows:

Section 504 [500]. Any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest.

The decisions of the courts applicable to this section are grouped in 1 Hill's Oregon Code. Pp. 458–460.

Such a suit can be brought only by one in possession.

Coolidge *vs.* Forward, 11 Or., 118.

A suit to ascertain and quiet title under this section extends to and includes all the grounds of controversy between the parties as to the title of the premises, and by the final decree therein all matters affecting such title are determined.

Starr *vs.* Stark, 1 Saw., 270.

It is enough if the claim is likely to create doubt and uncertainty in respect to the title of the true owner, or operate injuriously to his enjoyment of

or beneficial dominion over the property.

Murphy *vs.* Sears, 11 Or., 12.

A party has the right to be quieted in his title whenever any claim is made to real estate, the effect of which may be litigation or a loss to him of the property.

Horn *vs.* Jones, 28 Cal., 204.

In an action to quiet title to a mining claim, where the plaintiff claimed only a possessoary title in the public lands of the United States, it was held that such a claim or title was sufficient to enable him to maintain the action.

Pralus *vs.* Pacific, etc., Co. 35 Cal., 34.
Merced Mining Co. *vs.* Fremont, 7 Cal., 319.
Smith *vs.* Brannan, 13 Cal., 107.

It is not essential in an action under this section that the complaint should aver the plaintiff to be the owner in fee; it will be enough if it appear that the plaintiff claims an interest in the land, and that the defendant asserts an adverse claim.

Stoddard *vs.* Burge, 35 Cal., 394.
Rough *vs.* Simmons, 65 Cal., 227.
Pierce *vs.* Felter, 53 Cal., 18.

II.

Abstract of Transcript.

On p. 1, near the top, there is this sentence: "*Bill of Exceptions.*"

Then follows:

1. Stenographic report of the evidence, or what

purports to be such. Pp. 1–139.

2. Charge to Jury, 140–143, no file marks.

3. Bill of complaint, 143–146, filed June 6, 1899.

4. Answer, 146–152, filed June 22, 1899.

5. Reply, 152–155, filed June 22, 1899.

6. Exceptions to instructions given and refused by the court, 155–158, filed November 14, 1899.

7. Affidavit of value, 159, filed November 22, 1899.

8. Notice of appeal, 160, filed December 8, 1899.

9. Application for time in which to perfect appeal, 161, filed December 14, 1899.

10. Appeal bond, 161, 162, filed December 13, 1899.

11. Docket entries relating to trial of case, numbered 963, 163–166, no file or date marks.

12. Verdict of jury, 166, no file marks or date.

There is no conclusion to or signing of this pretended bill of exception. Therefore, it is not a bill of exceptions at all, and we submit that nothing in the Transcript of Record from page 1 to page 139 can be considered by the court, *except the pleadings*.

The next alleged bill of exceptions is on pp. 166–207. It begins as follows: "Bill of Exceptions," and was allowed and signed February 6, 1900, but there is no file mark thereon, though Hill's Oregon Code requires it to be filed. The statute is as follows:

> Section 233 [230]. The statement of the exception when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause.

This paper contains:

1. Assignment of Errors, pp. 166–196; not signed; no file marks.

This assignment contains the complaint and summons in C. G. Lewis *et. al. vs.* William A. Chisholm *et. al.* No. 967, in the court below, pp. 168–170, relating to the same property, and also filed June 22, 1899.

(*a*) Also an answer in the case at bar, August 5, 1899, pp. 171, 172 alleging the pendency of the action above mentioned.

(*b*) Then follows the reply to the answer just named, pp. 172, 173, filed November 16, 1899.

(*c*) Next is the judgment or order dismissing case No. 967.

(*d*) Extracts from the testimony and assignments of error based on the ruling of the court, pp. 174–196; not signed; not filed.

2. Verdict of the jury. P. 196, filed November 14, 1899.

3. Motion for judgment, notwithstanding the verdict, p. 197, filed November 15, 1899, and order overruling the motion.

4. Motion for new trial, filed November 15, 1899, and order overruling it, filed November 21, 1899, pp. 198, 199.

5. Objections to judgment, filed November 22, 1899, pp. 199, 200.

6. Decree and judgment, filed November 25, 1899, pp. 201, 202.

7. Application for supersedeas bond, filed November 25, 1899, pp. 202, 203.

8. Overruling of objections and denial of application for supersedeas bond, p. 203.

9. Notice of settlement of bill of exceptions, p. 204.

10. Order shortening time of serving notice of settlement of bill, p. 205, filed January 18, 1900.

11. Motion for special findings which was overruled February 6, 1900. P. 205.

Objections to the Bill.

While this "bill of exceptions" lacks some of the ordinary features, and was not filed. We will treat it, for the sake of the argument, as a valid bill of exceptions as far as it goes, but will point out some of its principal defects, as follows:

1. The evidence is not in the bill; nor is it in the record, for it was *not filed.*

2. The instructions given are not in the bill; nor are they in the record, for they were not filed or incorporated in the alleged assignment of errors, or brought into the record in any manner.

3. The exceptions to the instructions given and refused are not in the bill.

4. The assignment of errors was not signed or filed, and so not properly in the bill.

If these objections are well taken, the judgment of the court below will have to be affirmed, for all the questions discussed in the brief for the appellants are based on the evidence and the instructions given and refused.

III.

The Evidence.

The summary of the appellee's evidence found in appellant's brief, and the various discussions of it

therein, are so inexact not to say biased, that we wish to offer a brief outline of the testimony, although we do not believe any of the evidence is in the record, for the reasons heretofore stated.

The testimony for the appellees is to be found, if it can be said to be in the record at all, on pages 1 to 46, and in rebuttal from page 132 to 137. The witnesses were Peter Hall, William A. Chisholm, James Hanson, Daniel Sutherland, and Al. Lowe. The testimony in rebuttal was in denial of certain alleged conversations testified to by the witnesses for the appellants, and it need not be considered in this connection.

In addition to the oral testimony for the appellees, was the following written evidence:

1. Exhibit A—Power of attorney from Hall *et. al.* to Cahoon, October 4, 1898. P. 3.
2. Exhibit B—Location notice of Hall. P. 4.
3. Exhibit C—Location notice of Chisholm. P. 24.

(*a*) Hall's testimony shows that he Hanson, Chisholm, Sutherland, Hawes, and Cahoon in October, 1898, were at Pleasant Camp above Porcupine, on the Dalton trail, on the other side of McKinley creek, just about the boundary line, and it was decided that Hanson, Sutherland, and Cahoon should go prospecting on the Porcupine river. Hall could not go, and so it was suggested that a power of attorney should be given Cahoon. The latter drew up the instrument and it was duly signed. It reads as follows:

"Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of

Pleasant Camp, British Columbia; have made, constituted, and appointed, and by these presents do make, constitute, and appoint C. P. Cahoon, of Pleasant Camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead to locate a mining claim in the Territory of Alaska.

In testimony hereof we have hereunto set our hands and seal this 4th day of October, A. D. 1898.

PETER HALL. [Seal.]
WM. A. CHISHOLM. [Seal.]
WM. S. HAWES. [Seal.]

Signed, sealed, and delivered in the presence of—

DAN SUTHERLAND.
P. 3. J. HANSON.

The men went away, but in a few days Cahoon returned and said he had "staked" them on McKinley creek. Hall and his associates went to the claims October 19 or 20, 1898, and found a location notice there, of which the following is a copy:

"*Location Notice.*"

"Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine river, in the district of Alaska.

PETER HALL, *Locator.*

Witness:
J. HANSON.
D. SUTHERLAND. P. 4.

Hall had the notice recorded as follows:

(Endorsed:) Peter Hall location, McKinley Cr. District of Alaska, Juneau, *ss:* The within instrument was filed for record at 2.15 o'clock p. m., Nov. 21, 1898, and duly recorded in Book 6, Placers, on page 107, of the records of said district. Norman E. Malcolm, district recorder. P. 4.

The Hall notice was put on one side of a stake and on the other side was Chisholm's notice, in his own handwriting. P. 5.

That notice was as follows:

"*Location Notice.*"

"Notice is hereby given that I, the undersigned, have, this sixth day of Oct., 1898, located a placer mining claim 1,500 ft. along creek bottom and 300 ft. from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, *Locator.*

Witnesses:

D. SUTHERLAND.

JAMES HANSON."

And it was duly recorded. P. 24.

The winter season came on and work was shut down. About the first of May following Hanson, Chisholm, and Hall went back to the claims. On p. 5 Hall testifies as follows:

Q. What did you do?

A. We cut trails from Porcupine and cut trails up the creek to make it possible to get provisions up. The trail was along three or four claims, and done

considerable work to make it possible to get in provisions.

Q. What else did you do?

A. We built a flume about 2,000 feet long to get water to work the mine, and we worked the mine most of the summer and done considerable work all over.

Q. In opening it up?

A. Yes, sir.

And on p. 6 Hall testifies:

Q. That claim, as I understand, is in the Porcupine mining district, district of Alaska.

A. Yes, sir; it is.

Q. Now, after the location of these claims state if all these gentlemen agreed to work these claims together as a partnership and own them as such.

A. We did.

Q. And you own them as such now?

A. We do.

On cross-examination, he testifies, p. 21, that when he went to the claims about Oct. 20 he "designated an upper stake," "set a kind of notice there," "a duplicate of this notice as near as possible," signed and dated it.

(*b*) Chisholm's testimony, pages 22 to 31, corroborates Hall. Cahoon wrote the power of attorney, and then Chisholm and Hall grub-staked the prospecting party, consisting of Cahoon, Sutherland and Hanson, and they started into the Porcupine mining district. On the 8th of October they returned very much pleased, exhibiting some nuggets of gold, and Cahoon said he had staked all the boys, and to show that he had been impartial he staked

Chisholm first, Hall next, Hawes next, and so on up the creek. His actions in the premises were approved by his principals. The next day Chisholm, Hanson, Cahoon and others started up the Porcupine, and on the 19th of October Chisholm, Hall, Hanson, Sutherland and Jack Dalton reached the claims. They found the Chisholm location notice heretofore copied in this brief and had it recorded. Trans., p. 24.

In the spring of the following year they did considerable development work on the claims. They cut a long trail in order to get lumber and provisions up, building a flume 2,000 feet long and using 6,000 feet of lumber. Since that time they have continued to work the claim and were working it at the time of the trial.

On cross-examination, he says that his location notice was posted on an old snag and it was written on the wood with an indelible pencil. Page 29.

(c) Hanson's testimony, 31 to 40, is to the same effect. He says that Chisholm and Hall grub-staked Cahoon, Sutherland and himself, and they were to stake out claims for them. They went to the Porcupine, as directed, and the witness saw Cahoon stake a claim for Chisholm first and Hall next on the 6th day of October. A Mr. Hackley was present at that time. This man made a great deal of trouble afterwards, and it is important to note the testimony of his presence at the time of the staking of the claims. The witness says that Hackley made no objection nor did anyone else object to what was done. The party remained there two days and then went back to Pleasant Camp, where they found

Chisholm, Hall and Hawes. This witness returned to the Porcupine with Dalton, Chisholm, Hall and Hawes about the 19th or 20th of October, and they went to where the notice of location was.

On cross-examination, he said, among other things, that Hackley joined himself, Cahoon and Sutherland, and went with them to the Porcupine, and that Hackley was within 100 feet of Cahoon when the latter posted the location notice on the snag. They were all prospecting, working, panning out, digging and looking after gold. Page 35. The witness says, on the same page, that Hackley found gold there and called for the others to come and see it, Sutherland being the first one to see it.

Q. Were you with them all the time?

A. No. Mr. Sutherland and Mr. Cahoon came down into the creek about ten minutes before Mr. Hackley.

Q. Which one discovered gold?

A. Mr. Sutherland.

Q. What did he say when he found it?

A. I don't know what he said.

Q. Did he say anything to you and Cahoon?

A. Yes, sir.

Q. What did he say?

A. He said he found colors.

Q. When did Hackley tell you he found colors?

A. He was down in the creek, and he ran onto a crevice.

Q. According to your idea, Sutherland first found colors, and Hackley found it next, and within 100 feet of where this sign was put up?

A. Yes, sir; less than 100 feet.

Q. It would be on one of the claims in controversy?

A. Yes, sir.

Q. Which one?

A. Mr. Hall's.

Q. That on the claim which McConaghy is claiming now?

A. Yes, sir.

Q. So Mr. Hackley found gold on the claim in controversy?

A. Yes; that was where Mr. Sutherland first found the colors.

Q. Sutherland found colors below the claim in dispute between Hall and McConaghy, and also found some on the other claim in controversy?

A. Yes, sir.

Q. Isn't it a fact that Hackley found some pretty nice little nuggets and hollowed for you people to come and see them?

A. Yes, sir.

Q. Whose claim was that on?

A. Mr. Hall's.

Q. That is the one claimed in this case to be McConaghy's?

A. Yes, sir.

Q. You say that Sutherland found colors on the other claim. Did you see Hackley find anything on that claim while you were up there?

A. No, sir.

Q. You were with him all the time?

A. Yes, sir. (P. 36).

On p. 37 the witness was asked:

Q. Didn't you stake out a claim?

A. Yes, sir.

Q. Sutherland, did he stake out one?

A. Yes, sir.

Q. And one staked out for Hawes?

A. Yes, sir.

Q. Did Hackley stake out one?

A. No, sir.

Q. Was that all the staking that was done?

A. Mr. Cahoon staked out one for himself.

Q. You don't mean the whole time of this staking you parties were together up there, do you, Hanson?

A. Yes, sir; just about all.

Q. You would all go and stake one claim, and then all go and stake another claim?

A. Yes, sir; all within 150 feet.

(*d*) The testimony of Sutherland, pages 40 to 46, corroborates Hanson. He says they were outfitted by Chisholm and Hall, and they reached the Porcupine about the 4th of October, 1898, camped there that night, and on the morning of the 5th they started up the creek; but before they got to the mouth of McKinley Creek they met Hackley and other parties, who turned back and went up McKinley Creek with them.

Q. What did you do when you got up McKinley creek?

A. I was the first to get into the creek. I did a little panning and found there was gold there before the rest of the boys got there.

Q. Explain what kind of a place this was to get into there.

A. It is a kind of a box canyon.

Q. A difficult place to get in?

A. Yes, sir.

Q. Well, you say you discovered the first gold there yourself?

A. Yes, sir.

Q. About where was that? About what claim at the present time?

A. On the claim called the Chisholm claim.

Q. What, if anything, in the way of locations did you see Cahoon make there?

A. He didn't locate that day.

Q. What day did he?

A. On the 6th.

Q. State to the jury what locations were made on the 6th.

A. We stopped at a certain point where there was a snag stuck up amongst the rocks, and Cahoon said he believed he would locate the boys here as we go up, and I said all right; and he located Chisholm on the lower side and Hall on the upper side.

Q. Who was present at that time?

A. Hackley, Hanson, and I.

Q. How long did you remain on the creek?

A. That day until about noon on the next day.

Q. Who was staked next above?

A. Hawes.

Q. Is Hawes now one of the McKinley creek party?

A. Yes, sir.

Q. Was he along?

A. No, sir.

Q. Who staked for him?

A. Cahoon. P. 41.

On the next page he testifies that when they returned to Pleasant Camp, Cahoon told Chisholm and Hall that he had staked for them. The witness returned to the claim with Chisholm and Hall about the 19th or 20th of October, and again in May of the following year. Asked to state what work, if any, they had been doing there. He said:

> "We were working on the claims pretty much all summer, cutting trails and building a camp and building a flume to carry water 2,000 feet and working on the claims."

On page 43 the witness says that he was the first to discover gold on McKinley creek, and that he saw Hackley discover gold.

The evidence for the appellants is to be found on pages 46 to 131 of the transcript. Some of the witnesses testify that Hackley was the first discoverer of gold on the McKinley creek on the claims in controversy; some of them testify to the posting of the location notices, and then to the posting of other location notices covering the same property by other persons a few days afterward. In other words, some of these witnesses testify to the jumping of these claims, and to the usual occurrences in a lawless community struggling for valuable mining claims. All the witnesses who testify on the point agree that Hackley was one of the party which explored McKinley creek, and that he with others of that party did discover gold there. All the evidence shows that the country was extremely rough and difficult to explore. These claims were found in a wild region, and so new to the mining world that the few

men in it held a miners' meeting and elected a recorder to make record of their location notices, a thing which is only done where conditions are most primitive, but it is a custom which is sanctioned by the law. Section 2324, Revised Statutes.

IV.

The Power of Attorney.

Appellant's counsel assail the power of attorney on the theory that it granted power to Cahoon to locate a joint claim only. The language is "for us and in our names, place and stead, to locate a mining claim in the Territory of Alaska." Page 3. It would be a very narrow interpretation which would read this grant of power as a joint grant and one denying to the attorney in fact the power to locate a claim for each of the principals. This instrument, according to the evidence, was drawn at Pleasant Camp, in the wilderness, away from lawyers and those accustomed to the interpretation of language. The men who signed it were "grub-staking" and "outfitting" Cahoon and his companions, and it does not stand to reason that these three men would "grub-stake" and "outfit" three other men for prospecting with the understanding that the three principals should *jointly* have *one mining claim* as the result of their expenditure and risk. Cahoon and his companions did not so understand it, for, within less than four days of its execution, they located a claim for each of the three principals; the latter did not so understand it, for, when Cahoon re-

ported what he had done, they ratified his acts in the premises.

The natural and ordinary interpretation of the instrument, situated as were all the parties to it, was that *each of the principals* should obtain a mining claim by Cahoon's location as his representative.

In view of the verdict of the jury, it cannot be said that the practical interpretation which the parties put upon this instrument worked any damage to the appellants in this case. The verdict of the jury was based upon an entirely different theory of the case.

V.

The Location Notices.

The Hall notice is on page 4, and the Chisholm notice on page 24, of the transcript. Appellant's counsel assail these notices upon the theory that they are indefinite. If we were to depend upon appellants' brief, we might feel that these notices were quite indefinite, but when we come to read them exactly as they were written, posted and recorded, we find them definite and exact. Hall's notice locates "a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek, in Porcupine Mining District, running into Porcupine river. This claim is the east extension of W. A. Chisholm's claim on about 1,800 feet from the first falls above the Porcupine river, in the District of Alaska."

The general location of the claim is clearly stated. It is the east extension of Chisholm's claim, about 1,800

feet from the first falls above the Porcupine river. There it begins and then it runs 1,500 feet with the creek and 300 feet on each side from center of creek. Placer mines are not often laid on precipices and never on mountain crags. They are naturally made to follow the windings of streams, gorges or canyons, for long experience has shown that the precious metals seek such hiding places. This claim for a distance of 1,500 feet, winds up the narrow valley of McKinley creek, 300 feet in width on each side of the center of that stream. An intelligent boy with a shoestring two feet in length could find this claim and locate its boundaries.

Chisholm's notice is equally definite. P. 24. His claim is the west extension of Peter Hall's claim about 300 feet above the first falls on McKinley creek. Beginning at this point 300 feet above the falls, he locates "a placer mining claim 1,500 feet along creek bottom, and 300 feet from center of creek each way, on creek known as McKinley, in Porcupine Mining District."

Thus we have Chisholm's claim, beginning 300 feet above the falls and going 1500 feet up the creek, where it finds Hall's claim, which runs 1500 feet further up the creek. These two claims stand end to end and extend 300 feet on each side of the center of the creek. In the absence of surveyors, platters, draftsmen and map-makers, we do not see how a more definite and exact description could have been given, and we venture the assertion that these location notices are as perfect in their way as such notices have been in the other mining camps and regions of this country.

VI.

"No Marking on the Ground."

Counsel for appellants, under the above heading, insist that the posting of notices on the snag standing on the line of these two claims did not comply with Section 2324 R. S., which provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Counsel for appellants, on pages 8 to 14 inclusive of their brief, quote from numerous cases on the general subject of marking on the ground. We hazzard the suggestion that a study of the cases cited will show that the controversy arose from overlapping boundaries of different claims and not where, as in the case at bar, two different parties were litigating about the same tract or claim.

In the case before the court the appellants and the appellees are litigating about the title, possession, and profits of two mining claims. Each side claims to have the exclusive title and right to possession and profits. Locators Hall and Chisholm, and those associated with them, have been in possession under a claim of title and have been enjoying the profits of the claims. Hackley, and those associated with him, the appellants in this case, put up their location notices, and ever since then have been trying to get possession of this property.

On pages 46 to 77 Cahoon testifies, and in his testimony he makes use of a plat. On page 49, while still using the plat, the following occurred:

"Q. What are the two claims marked closest to the mouth of the creek? What two claims are those?

"A. Hackley and McConaghy.

"Q. Are those the two claims in controversy in this case?

"A. Yes, sir."

On the next page Cahoon further identifies the Hackley and McConaghy claims as the Hall and Chisholm claims which Cahoon located for them. His testimony makes it clear that he was in collusion with Hackley at that time, although he was acting as the duly accredited agent of Hall and Chisholm. There can be no doubt that on that day began the conspiracy between Cahoon and Hackley to take these two claims away from the principals who had reposed their confidence in Cahoon. Indeed, on page 50, Cahoon says that he told Hackley that, so far as he was concerned, there would be no difficulty about his getting the claim. They were conspirators against the "grub-stakers" and "outfitters" of Cahoon, and since then they have been endeavoring to make the conspiracy effective.

Counsel for Hackley and McConaghy in the case at bar have found so much fault with the location notices of Hall and Chisholm that we may be pardoned for asking the attention of the Court to the Hackley and McConaghy location notices. Hackley's notice is on page 81, and it reads as follows:

"*Notice of Location.*"

"Notice is hereby given that I locate and claim, under the United States mining laws, one

mining claim on creek known as McKinley creek, 1,500 ft. from this notice up creek and 300 feet on each side of center of creek bed, in the Porcupine mining district, district of Alaska.

"Oct. 8th, 1898.

E. HACKLEY, *Locator.*

Witnesses:
C. G. LEWIS.
ALEX. MCCONAGHY."

The McConaghy notice is on page 131, and is an exact copy of the Hackley notice, with one less witness.

If the Hall and Chisholm notices are insufficient, it certainly follows that the Hackley and McConaghy notices are insufficient also.

Hackley testifies on page 80 that, on the 8th of October, he took two stakes, put them in the ground, and put the notices on them, one stake on the dividing line between claims 2 and 3 and the other stake on the dividing line between claims 1 and 2, indicating the claims on the plat, they being the claims in controversy here. On page 81 Hackley testifies that his location notice was 150 feet below the place where Cahoon had put a notice on the snag. Hackley's testimony is corroborated on this point by C. G. Lewis, pages 131 and 132.

If "the marking on the ground" was insufficient as done in the location of the Hall and Chisholm claims, the same must be held of "the marking on the ground" in the location of the Hackley and McConaghy claims.

Counsel for appellants does not make an exact quotation of the opinion of Judge Sawyer in the

case of Jupiter Mining Company *vs.* Bodie Consolidated Mining Company, 11 Fed. Rep., 666–677, where that learned Judge said:

> "The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that the '*location* must be distinctly marked on the ground so that *its boundaries can be readily traced*,' but the law does not define or prescribe what kind of marks shall be made or upon what part of the ground or claim they shall be placed.
>
> "Any marking on the ground, claimed by stakes and mounds, and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator so long as he continues to perform the necessary work upon the ground and to comply with the law in other respects."

The learned judge then instructed the jury that if they believed from the evidence that the claim was actually and distinctly marked on the ground by stakes, notices, monuments, and work, so that its boundaries could be readily traced, and a vein containing gold or silver had been discovered there, and sufficient work was done to comply with the laws of Congress, then the location was valid.

In the case at bar it is clear that the jury believed that the claim had been distinctly marked on the ground by stakes, notices, and work, that precious metals had been discovered there, and that sufficient work had been done thereon to comply with the laws of Congress, and therefore the jury found a verdict for the appellees.

In North Noonday Mining Company *vs.* Orient Mining Company, 1 Fed. Rep., 522–532, 533, Judge Sawyer charged the jury as follows:

> "The next point to which I call your attention, gentlemen of the jury, is the location. To make a valid location, under the statute, it is required that 'the *location* must be distinctly marked on the ground, so that *its boundaries can be readily traced;*' but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the *boundaries* of the claim located *can be readily traced*, is sufficient.
>
> "If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law."

All this was done by the appellees' in the case at

bar, and we submit that their location notices and the "markings on the ground" were in all things sufficient.

But we are not without further authority on the subject of notices.

In Haws *vs.* Victoria Copper Mining Company, 160, U. S., Dyer located two mining claims by writing on a tree standing at or in close proximity to the place or places of discovery of said vein or lode, the two notices of location, one for each of the claims, and the notices which described the respective claims by reference to the tree. The notices also respectively described the boundaries of each claim by courses and distances from the tree. Each notice contained the name of the locator and date of location. The court below found that the tree was a sufficient natural object by which the claims could be identified.

Concerning the sufficiency of Dyer's notices, this court on page 318 said:

> "Moreover, the acts of Dyer, enumerated in the fourth finding, constituted a sufficient location by him of the two claims as against subsequent locators, irrespective of the posting of notices."

VII.

The Discovery of Mineral.

The evidence heretofore cited and quoted shows that four men, Hackley and Sutherland among them, explored McKinley Creek in October, 1898. They were exploring this region in company. Suth-

erland testifies that he was the first to make the discovery of gold, and in this he was corroborated by other witnesses. Hackley testifies that he made the first discovery of gold.

We submit that it does not matter which of these men made the first discovery in point of minutes; the central fact is that gold was discovered by these men who were hunting for it in company with each other, each having his own ends to accomplish, and that when the gold was discovered notices were posted immediately and claims were located for Hall and Ghisholm. The first to take advantage of the discoveries were Hall and Ghisholm. Hackley concluded a day or two afterwards to endeavor to take these claims for himself and McConaghy, and that determination of his was the origin of the present litigation. The court instructed the jury on the subject of discovery, and it is evident that the jury believed the testimony of the witnesses for the appellees on that point and returned their verdict accordingly.

We will add, also, that if Hackley were the original discoverer he could not, as the court below very properly instructed the jury, hold the district in his hand while he went on making other explorations for the purpose of deciding in his own mind which were the richer claims. If he made a discovery on a claim and went on looking for richer fields, he cannot be heard to complain because another man present at or participating in the discovery posted location notices and took the steps required by the law.

VIII.

"Location by Alien Void."

Counsel for appellants, under the above heading, find a great deal of fault with the instruction of the court to the effect that the question of citizenship was one which could be raised by the United States only, and that one man against another cannot question the citizenship of either.

The instructions given and asked upon this subject were upon the theory that the question of citizenship was involved. We do not know whether there was any evidence on the subject or not; the stenographer's notes, which occupy a large part of the transcript, do not begin with the first questions asked the witnesses, but each witness was asked about his residence, and each answered that he resided in Alaska. We submit that a residence in Alaska, in the absence of positive testimony to the contrary, must be held to imply citizenship in the United States. If a witness were asked his residence, and he answered that he resided in Ohio, the inference would follow that he was a citizen of the United States unless there were satisfactory and direct evidence to the contrary. Therefore we submit that there is no evidence in the record that the appellees were aliens.

Next, we submit that the question of alienage is not one which could be litigated in this suit in equity to secure to the complainants peaceable occupancy and quieting of title. A question of that kind could be raised in a proceeding in the General Land Office on an application for patent or by suit

on mineral adverse claim. If the appellees apply for a patent then the appellants under the law will have sixty days in which to file an adverse claim in the local land office and thirty days thereafter in which to file a suit in court upon the adverse claim so made to test the validity of any and all of the proceedings from the discovery of the minerals on until the end. Sec. 2326, Rev. Stat. This was the proceeding in Manuel vs. Wulff, 152 U. S., 505, 511.

In an adverse claim which may be filed by the appellants in a local land office they can raise the question of the alienage of the applicants for a patent. When the appellants bring their suits in the courts predicated upon their action in the local land office they can allege the alienage of the appellees. In the proceedings in the General Land Office and in suits in the United States courts the Government is not a party of record, but its officers obey the judgment of that court and execute the patent to the party who may be decreed entitled to it. The judgment roll is sent to the Commissioner of the General Land Office, and the patent is issued pursuant thereto. Sec. 2326, Rev. Stat.

The case of Manuel vs. Wulff, 152 U. S., 505–511, is in point here. It is held there "that if there had been no adverse claim in the Land Office Moses Manuel's application, which appears, in respect to this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it."

The opinion in that case is based upon the theory that a location made by an alien is not void but voidable, and the defect may be cured by the sub-

sequent naturalization of the locator.

In *McEvoy* vs. *Megginson*, 29 Land Dec., 164, Hanley, an alien, made a mining location. Application was made for a patent, but a protest was filed in which it was alleged that Hanley was not a citizen of the United States when he located the claim. It was held by the assistant secretary that Hanley's location was not void but voidable, and his declaration of intention to become a citizen of the United States related back to the date of his location and operated to validate it.

Thus we have another method furnished for testing the alienage question and we also have another ruling that a location made by an alien is voidable only. These rulings are in harmony with other well-considered cases. *Crœsus Mining Company* vs. *Colorado Land and Mineral Company*, 19 Fed. Rep., 78; *Lone Jack Mining Company* vs. *Meggison*, 82 Fed. Rep., 89.

No doubt the Government could maintain a suit in equity to set aside a patent issued to an alien.

View the question from whatever standpoint you will it is clear that the Government must participate in denying to an alien the fruits of any location or application he may make under our mining laws, and that until the Government does exercise its prerogative the location or application of the alien is voidable only.

We submit that the court below did not err in its instruction to the jury.

IX.

Intruder's Have No Rights.

In Haws *vs.* Victoria Mining Company, 160, U. S., 303, Dyer had discovered two mining claims and he had posted notices which were not recorded because there was no mining district recorder in that region, and he had also done some marking on the ground. Subsequently he and his grantee worked the mine. Haws and another employee conceived the idea that the proceedings of Dyer and his grantee were insufficient in law and determined to jump the claims. Accordingly, they posted notices of their own, and took possession of the claims with force. Suit in ejectment and for an injunction was brought, and this court, on page 316, said:

> "The facts on this subject established by the findings are briefly these: Haws, an employee of the defendant in error, while engaged in such employment in working the mines by it located and of which it was in the actual possession, conceived the secret intention of taking possession of the property of his employers for his own benefit. In execution of this illegal purpose he procured the assistance of Timothy in making a so-called location on the ground which was then occupied by his employer and upon which he (Haws) was working as its servant. That they set stakes and posted notices so as to cover the claims already discovered and which he knew were being worked at the time these stakes were placed and notices posted, and that shortly after this wrongful driving of stakes, Haws, in the night time, ousted the defendant in error from the possession which it enjoyed,

and the illegal dispossession thus accomplished was thereafter maintained by force. The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrong doing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed."

Numerous cases are cited in support of the doctrine thus laid down by the court.

We have seen that the notices and the markings of Hackley and McConaghy were clearly unlawful if it is to be held that the notices and markings of Hall and Chisholm were unlawful. This being true, Hackley and McConaghy and their associates were trespassers and intruders as against the occupancy of these claims maintained and enjoined by the appellees. That occupancy the appellees had the right to continue to enjoy as against the acts of trespass committed by the appellants, and the application of the doctrine of *Haws* vs. *Victoria Copper Mining Company* entitled them to the relief which they sought by their bill of complaint and which the court below gave them by its decree.

Finally, we submit that there is no error in the record and that the judgment of the court below ought to be affirmed.

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No. 37.

Brief of Dudley & McKinley

Appeal

Filed Nov. 23, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

McKINLEY CREEK MINING COMPANY *et al.*, Appellants,
vs.
THE ALASKA UNITED MINING COMPANY *et al.*. } No. 37.

Appeal from the District Court of the United States for the District of Alaska.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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GORHAM T. PLANTY PRINTING CO.

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Brief for Appellees Filed at the Request of the Court.

The Court has requested counsel to file briefs on the question as to what errors in respect of giving or refusing instructions, or other rulings, on a trial by jury in a case of this character, are open for consideration on appeal from the District Court of Alaska.

I.

This is a Suit in Equity.

This case was tried in the District Court of the United States for the District of Alaska pursuant to the Act of Congress approved May 17, 1884 (23 Stat., 24, 25, 26). That statute, so far as it relates to civil proceedings, was not abrogated until the Act of June 6, 1900, making further provision for the civil government for Alaska, took effect. (31 Stat., 321.) The judgment was rendered November 25, 1899. (Rec., 202.) Therefore it is clear that this case was adjudicated under the Act of March 17, 1884.

Section 7 of that act provides that "the general laws of the State of Oregon, now in force, are hereby declared to be the law in said District, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

We find the following provisions in section 7 of the Act of Congress approved May 17, 1884: "But the said district court shall have exclusive jurisdiction in all cases *in equity* or those involving a question of *title to land*, or *mining rights*, or to the constitutionality of a law, and in all criminal offences which are capital. In all civil cases, *at common law*, any issue of fact shall be determined by a jury, at the instance of either party." * * * (23 Stat., 25, 26.)

We submit that this statute preserves distinctly the differences between actions at law and suits in

equity which have prevailed from the beginning in our National legislation and jurisprudence.

If the laws of Oregon are to be considered in this connection, it seems to us that they must be held to fix the character of this litigation as a suit in equity.

The Constitution of Oregon was made in 1857 and it went into effect February 14, 1859, the date fixed by the Act of Congress admittting Oregon into the Union. (See note at the top of page 77, 1 Hill's Oregon Code.) Sec. 17, Art. 1, of that Constitution is as follows: "In all civil cases the right of trial by jury shall remain inviolate." The meaning of this section is, that the right of trial by jury shall continue to all suitors in the courts in all cases in which it was secured to them by the laws and procedure of the courts at the time of the adoption of the Constitution. (*Tribon* vs. *Strowbridge*, 7 Or., 156.)

Chapter 2 of the Oregon Code relates to issues, trials, and judgments in civil actions. (1 Hill's Or. Code, 282, 286, 293, 303.) This chapter does not relate to the trial of suits *in equity*, but such suits are covered by chapter 5 of the Code. (1 Hill's Or. Code, p. 404.) Sec. 380, p. 404, provides that "the enforcement or protection of a private right, or the prevention of or the redress for an injury thereto, shall be obtained by suit *in equity* in all cases where there is not a plain, adequate, and complete remedy at law; and may be obtained thereby in the cases where courts of equity have been used to exercise concurrent jurisdiction with

courts of law, unless otherwise specially provided in this chapter."

This is from the first section of chapter 5, and it clearly states the general principles of equity jurisdiction.

Section 504, 1 Hill's Oregon Code, 458, is the first section of Title VIII, chapter 5, relating to *suits in equity*, and it is that section on which this suit is predicated. It is as follows: "Any person in possession by himself or his tenant of real property may maintain a suit *in equity* against any other who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest." This language, as well as the location of the section in that part of the Code relating to suits in equity, puts the case at bar in the category of equitable proceedings, and makes it impossible to classify it as an action at law under the laws of Oregon.

These statutes and decisions show, as we think, that this is a suit in equity, when looked at from the Oregon standpoint.

And we submit, also, that this is a suit in equity, whether tested by the rules of State or of National procedure and jurisdiction.

II.

Power of this Court on Appeal.

The concluding sentence of the Act of May 17, 1884 (23 Stat., 25, 26), is as follows:

"And the final judgments or decrees of said circuit and district court may be reviewed by the Supreme Court of the United States as in other cases."

To what extent and in what manner does this Court "review" the "decree" of the court below "in other cases" on appeal?

1. THE JURY TRIAL.—If the case was triable only under the laws of Congress, it could not have been sent to a jury as of right. (Sec. 648, Rev. Stat.) If it were triable under the laws of Oregon, it could not have been sent to a jury as a matter of right, as we will show in this brief later. (See Hill's Or. Code, sec. 396.)

As was said in *Wilson* vs. *Riddle* (123 U. S., on p. 615); "The submission of the issues to the jury was for the information of the conscience of the chancellor. It is evident from the terms of the decree that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding upon the proof submitted. Under said circumstances, it is not the practice of an appellate court to consider *formal exceptions to rulings in the course of the trial of the issues before the jury.* (*Brockett* vs. *Brockett*, 3 How., 691; *Johnson* vs. *Harmon*, 94 U. S., 371; *Watt* vs. *Starke*, 101 U. S., 247.")

In the case at bar, the Record shows that the decree was rendered on the pleadings, "and the said proofs, and by reason of the verdict of the jury

thereon, approved and adopted by this Court." * * * (Rec., p. 201.)

Thus it appears that the chancellor adopted the verdict of the jury, and that the rule above quoted should be applied to all "formal exceptions to rulings in course of the trial of the issues before the jury," and such formal exceptions should not be considered by this Court.

2. TERRITORIAL COURTS.—It is provided by section 702, Revised Statutes, that "the final judgment and decrees of the supreme court of any territory, * * * may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of the circuit court." * * *

If the courts of Alaska are to be compared with territorial courts, generally speaking, then it would seem that appeals from decrees rendered by the Alaska courts are to be treated by this Court exactly as are treated appeals from the decrees of territorial courts.

It is well settled that this Court cannot consider the weight or sufficiency of the evidence on appeal from a decree rendered by a territorial court (*Karrick* vs. *Hannaman*, 168 U. S., 328) and that alleged errors in the admission or rejection of evidence cannot be passed upon by this Court on appeal from a decree rendered by a territorial court, where it cannot be done without examining the weight of evidence and disregarding the facts found. (*Young* vs. *Amy*, 171 U. S., 179.)

If the whole evidence is recited in the statement of the case made by the territorial court, this Court can consider it only for the purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supports the findings of the lower court. (*Idaho & Or. Land Imp. Co.* vs. *Bradbury*, 132 U. S., 509.)

These rulings are predicated on section 2 of the Act of April 7, 1874, 18 Stat., 27, which provides "that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below," etc.

In *San Pedro Co.* vs. *United States*, 146 U. S., 120, 130, this statute was held to limit this Court, on appeal from a decree rendered by a territorial court, to a determination whether the findings of fact made by the court below supported its decree, and whether there was any error in the rulings duly excepted to on the admission or rejection of evidence; and it was held that the authority of this Court in such cases does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. To the same effect are *Holoway* vs. *Dunham*, 170 U. S., 615; *Marshall* vs. *Burtis*, 172 U. S., 631; *Cohn* vs. *Daley*, 174 U. S., 539.

3. CIRCUIT COURTS.—Section 692, Revised Statutes, provides that "an appeal shall be allowed to

the Supreme Court from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, * * * and the Supreme Court is required to receive, hear, and determine such appeals."

This Court has held that, under this section, the facts found by the court below are conclusive here, and that this Court will pass on such rulings only as might be presented by a *bill of exceptions prepared as in an action at law*. *The City of New York*, 147 U. S., 72, 76, 77, and numerous cases cited.

The case of *Parsons* vs. *Bedford*, 3 Peters, 433, we believe to be quite instructive in this connection. That case came to this Court on a writ of error and the district court of the United States for the Eastern District of Louisiana, and the suit was originally commenced by an attachment in the State court, but it was removed to the Federal court on the petition of the defendant, a citizen of Massachusetts. It was tried in the Federal court before a jury. A specific exception was taken on the trial to the competency of Fiske, a witness, to testify, and a bill of exceptions was filed for the purpose of preserving the case. Mr. Justice Story wrote the opinion of the Court, and, after discussing at some length the statute of Louisiana concerning trials by jury, considering the Seventh Amendment of the Federal Constitution, and showing that this amendment preserved the right of trial by jury in "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights," he discussed the power of this Court to re-examine

the facts tried by a jury in any other manner. (See pages 479–481.)

In passing on this branch of the case, Mr. Justice Story said:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the reward of a *venire facias de novo*, by the appellate court, for some error of law which intervened in the proceedings."

The foregoing language was quoted with approval in *Hepburn* vs. *Dubois*, 12 Peters, 345, 376, and the Court said:

> "If this Court can comprehend what these rules are, or promulgate them in intelligible language, they are these:
>
> "That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it

was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of the case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom; in the same manner and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence."

That case has been followed repeatedly by this Court. (*Miller* vs. *Life Ins. Co.*, 12 Wall., 285; *Hathaway* vs. *Bank*, 134 U. S., 494.)

4. STATE COURTS.—Section 709, Revised Statutes, provides that "a final judgment or decree in any suit in the highest court of a State, * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." * * * *

In *Egan* vs. *Hart*, 165 U. S., 188, it was held "that on error to a State court in a chancery case, as in a case at law, when the facts are found by the court below, this Court is concluded by such findings." And the Court held that it could not re-examine the evidence. See, also, *Dower* vs. *Richards*, 151 U. S., 658, where the cases are collected.

III.

No Error in the Record.

We think we have shown:

(*a*) That this Court is conclusively bound by the facts found by the court below, by the verdict, and the decree (Rec., 200–202) and will not review them.

(*b*) The weight or sufficiency of the evidence will not be considered by this Court.

(*c*) Formal exceptions to the rulings of the court below will not be considered here.

(*d*) Alleged errors in the admission or rejection of evidence will not be passed upon by this Court where it cannot be done without examining the weight of evidence and disregarding the facts found.

(*e*) If the whole evidence is recited in the statement of facts made by the court below, this Court can consider it only for the purpose of passing on the exceptions taken to the admission or rejection of parts of it.

(*f*) This Court may consider errors duly excepted to in the court below and preserved by a bill of exceptions, such as might be prepared in an action at law.

(*g*) The right of review is limited to questions of

law appearing on the face of the record and does not extend to matters of fact or discretion.

Certain questions now arise:

1. *How were the facts found and what are they?*

The Record shows that the defendants (appellants) asked for a jury and that one was empanneled and sworn. (Rec., 200, 201.) Doubtless this was done under section 396, 1 Hill's Oregon Code, which provides that "both issues of law and fact shall be tried by the court unless referred. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury the court may direct a statement thereof and a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in the action and the verdict may be read as evidence on the trial of the suit." (See *De Lashmutt* vs. *Everson*, 7 Or., 217; *Swegle* vs. *Wells*, 7 Or., 222; *De Lashmutt* vs. *Tillotson*, 7 Or., 212; *Learned* vs. *Tillotson*, 97 N. Y., 1.)

There is no other provision relating to the trial of questions of fact by juries in *equity cases.*

The Record shows that the jury heard the evidence, etc., and returned a verdict which found for the plaintiffs (appellees) as to the property in controversy. (Rec., 201.) "Which said verdict was by the court received and ordered recorded, and the findings therein contained upon the issues in said cause were by the court approved and adopted." (Rec., 201.) The verdict, and this adoption of it by the court, make an affirmative

finding by the court below in favor of the plaintiffs (appellees) on all the averments of the bill of complaint. (Rec., 143–145.) The decree not only adopts the verdict of the jury, but it also orders, adjudges, and decrees that the defendants (appellants) have no right, title, or interest whatever in or to the property, and the title thereto is in the plaintiffs (appellees). (Rec., 201.) The bill of complaint, the verdict, and the decree show that the court found for the plaintiffs on the facts and the law, and we submit that such finding is condusive on this Court.

2. *Have any of the Rulings of the Court Below been Preserved Duly by the Bill of Exceptions or Otherwise?*

Title VIII, chapter 2, 1 Hill's Oregon Code, 316, relates to new trials and the method of applying for them. Section 235, p. 316, specifies the causes for granting new trials. These causes are those which prevail in all of the Code States. Following this section are notes covering seven pages, and containing citations to the decisions in Oregon and other Code States applicable to the granting of new trials, general irregularities on the trial, insufficiency of evidence to justify the verdict or decision, errors of law excepted to, etc.

Error which is relied on must be shown clearly, affirmatively, and specifically. (See authorities cited in 1 Hill's Code, 324.) Of course, this can only be done by a bill of exceptions, such as is provided for by Title VII, 1 Hill's Code, 313–316

and notes. Section 231, page 314, directs that "the point of the exception shall be particularly stated, and may be delivered in writing to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth." Section 232, p. 315, provides that "no particular form of exception shall be required. The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." The authorities are collected in a note to that section, and they hold that, to make an exception effectual in a bill of exceptions, the objection should be stated and also the ground upon which it was made. They also hold that insufficiency of the evidence must be specifically stated. Section 233 provides that the bill shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record in the case.

On pages 3–6 of our original brief, we gave the reasons why we thought there was no bill of exceptions in the Record. We are still of the same opinion. If there is a valid bill of exceptions in the Record, we think it is the alleged bill copied in the transcript on pages 166–207, beginning with the words, "Bill of Exceptions," allowed and signed February 6, 1900, but without anything appearing on it to show that it was filed as required by section 233 of the Oregon Code. If this alleged bill of exceptions is to be treated as valid, there are in it the following vital defects, as we think:

1. The evidence is not in the bill; nor is it in the Record, for it was *not filed.*

2. The instructions given are not in the bill; nor are they in the Record, for they were not filed or incorporated in the alleged assignment of errors, or brought into the Record in any manner.

3. The exceptions to the instructions given and refused are not in the bill or in the Record.

4. The assignment of errors was not signed or filed, and so is not properly in the bill or in the Record.

If these objections are well taken, the judgment of the court below will have to be affirmed, for all the questions discussed in the brief for the appellants are based on the evidence and on the instructions given and refused by the court below.

On page 198 of the Record, there is printed a "Motion for New Trial." The first ground of the motion is based on the evidence taken, offered, and admitted, and the rulings made and excepted to. It will be observed that the statement is broad and does not point out any of the supposed defects or errors.

The second ground is, "Insufficiency of the evidence to justify the verdict of the jury in said case, and that said verdict is against law." The reasons or grounds of insufficiency are not stated.

The third ground is, "Errors in law occurring at the trial and excepted to by the defendants, and

exceptions to the instructions given by the court to the jury, and exceptions to the refusal of the court or judge thereof to give certain instructions offered by the defendants and numbered 'III, IV, V, VII, VIII, IX.'"

This ground does not specify errors in law occurring at the trial and excepted to by the defendant, nor does it specify the exceptions to the instructions given by the court to the jury, nor does it set forth the exceptions to the refusal of the court to give the instructions offered by the defendants and numbered as above set forth.

It is well settled that exceptions and errors must be duly and particularly assigned and that general or specific statements will not suffice. The motion for new trial deals in glittering generalities only. There is nothing in it to point out to the court the nature of the alleged errors committed, nor the character of the objections and exceptions taken. We submit that this motion is not within the provisions of the Oregon Code heretofore cited, and that the overruling of the motion by the court was not erroneous.

There is printed in the transcript a paper which is entitled "Assignment of Errors," which begins on page 167 and ought to end somewhere, but we have not been able to find its termination clearly defined. At any rate, we are not able to find the signature of counsel or a filing mark thereon. The first assignment is at the bottom of page 167, and the last formal assignment that we are able to find is the second paragraph from the bottom of page

197, just above the figures "31." In our judgment, the matter printed on pages 166–197, inclusive, is not in the Record and should not be considered by this Court.

These objections cover the alleged objections to evidence and the exceptions concerning the giving and refusal of instructions to the jury.

We find nothing in the Oregon Code which requires the presenting or filing of assignments of error, and therefore we assume that counsel for the appellants understood that such assignments were required by the Federal practice. If this assumption be well founded, it is certain that an assignment of errors cannot become a part of the Record unless signed by counsel and filed in the cause, all of which must affirmatively appear upon the Record; otherwise such printed assignment is not a part of the Record, and cannot be considered by this Court.

For these reasons we repectfully submit that there is no error in the Record, and that the decree of the court below should be affirmed.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellees.

J. F. MALONY,
J. H. COBB,
Of Counsel.

Supreme Court of the United States.

No. 37.—October Term, 1901.

The McKinley Creek Mining Company et al., Appellants, vs. The Alaska United Mining Company et al. } Appeal from the District Court of the United States for the District of Alaska.

[January 6, 1902.]

This is a bill in equity brought by the appellee company, who was plaintiff below, to establish title to two placer mining claims, against a like claim of appellant company to the same ground.

The bill alleged that "Peter Hall, William A. Chisholm, James Hansen, John Dalton and Dan. Sutherland, partners under the firm name and style of the Alaska United Mining Company, bring this their bill of complaint against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, and show to the court that the said parties, both plaintiffs and defendants, are citizens of the United States and residents of the District of Alaska"

The bill also alleged ownership of the claims by reason of location, exploration and discovery of precious metals, and the compliance with the local rules and regulations of the mining district. Also possession of the claims and the erection of valuable improvements thereon, and forcible entry upon that possession by defendants (appellants) with an attempt and avowed purpose to drive plaintiffs (appellees) therefrom, and unless restrained they would proceed to the execution of said threats. An injunction was prayed for.

The defendants admitted their citizenship, but denied the citizenship of plaintiffs on the ground that the defendants had not sufficient knowledge to form a belief thereto, and traversed in like manner or absolutely the other allegations of the bill, and alleged title by reason of prior discovery by members of the company. The answer also alleged prior possession by members of the company from which they were dispossessed by the plaintiff, and claimed that as to the controversies thus arising "defendants are under the law and practice of this court entitled to a jury trial for the trial of the title to said claims and each of them, and to that end and purpose have commenced in this honorable court a suit in ejectment for the trial and determination of the title to said property in an action at law and according to the usage and prac-

tice of this court, and until the trial and determination of such trial at law by this honorable court the defendants are entitled to a restraining order against said plaintiff company and its individual members restraining them and each of them from the commission of the wrongful acts herein complained of."

A temporary injunction was prayed against plaintiffs (appellees).

There was a reply filed to the new matter of the answer and to the cross complaint.

A jury was impanelled to try the case on motion of plaintiffs, no objection being made by defendants, and after hearing the evidence and receiving instructions from the court the jury rendered a verdict for plaintiffs, as follows: "We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Co., the claims in controversy."

The defendants in due time moved for judgment, notwithstanding the verdict, upon the ground that on the evidence the defendants were entitled "to a judgment in their favor for the possession of the mines and property in controversy." The motion was denied.

Subsequently defendants moved for a new trial (1) upon the testimony in the cause, the rulings therein and exceptions taken, and upon the pleadings and proceedings in cause No. 967; (2) the insufficiency of the evidence to justify the verdict; (3) error in refusing to give certain instructions requested by defendants (appellants.)

The motion was denied and the following judgment was entered:

"This cause came on to be heard at this term upon the bill, the answer and cross bill of defendants and the replication thereto of plaintiffs and the proofs in the case and upon the request of defendants, duly made by their counsel, Messrs. Winn & Weldon, the issues arising upon said pleadings and proofs were submitted to a jury of good and lawful men, duly selected, impanneled and sworn, to wit, J. Montgomery Davis and eleven others, who, having heard the said proofs adduced in the case and having been instructed by the court as to the law, and having heard the argument of counsel, retired in charge of the bailiff to consider of their verdict and after due deliberation had returned into open court the following verdict, to wit:

* * * * * *

"We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy.

(Signed) J. Montgomery Davis, *Foreman.*

"Which said verdict was by the court received and ordered recorded, and the finding therein contained upon the issues in said cause were by the court approved and adopted.

"Now, therefore, upon consideration of the said bill, the answer thereto and the cross complaint of said defendants, the replication of plaintiffs, and the said proofs, and by reason of the verdict of the jury thereon, approved and adopted by the court, it is, upon consideration thereof, ordered, adjudged and decreed as follows, to wit:

"That the said defendants, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch and C. P. Cahoon, a mining copartnership under the name and style of the McKinley Creek Mining Co., have not nor have any of them any right, estate, title or interest whatever in or to those two certain mining claims, lands and premises described in the said bill of complaint and in the said answer and cross complaint of defendant and hereinafter more particularly described; that the title of the plaintiff, The Alaska United Mining Company, a corporation composed of Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen and John Dalton, thereto is good and valid, and that the said defendants and each of them be, and they and each of them are hereby, forever enjoined and restrained from asserting any claim whatsoever in or to said mining claims, lands and premises adverse to said plaintiffs, and that the said plaintiffs be, and they are hereby, quieted in their possession, use and enjoyment of the same."

A description of the claims followed.

Objection was made to the judgment, and the defendants, claimed that the only judgment which could be entered was one "restraining the defendants from the acts complained of in the bill of complaint pending the trial of cause No. 967, *The McKinley Creek Mining Co.* v. *The Alaska United Mining Co.*, which is a suit in ejectment now pending in this court and at issue, the record and files of which are hereby referred to and made a part of this objection."

From the judgment entered the case is here on appeal.

Mr. Justice McKenna delivered the opinion of the Court.

The assignments of error present for review the rulings of the court upon the admission of testimony, the correctness of the court's instructions to the jury and the sufficiency of the evidence to justify the judgment.

We may dispose of the rulings on the admission of testimony summarily. They are not precisely indicated by counsel in their brief, and to review them with a detail of the evidence would unduly extend this opinion. It is enough to say that we have examined the evidence and considered the rulings, and do not discover any prejudicial error in the latter. Besides, it is questionable if such rulings are reviewable in an appellate court. (*Wilson* v. *Riddle*, 123 U. S. 608; *Hun* v. *Washburn*, 59 Wis. 414; *Peabody* v. *Kenall*, 145 Ill. 519.)

For an understanding and consideration of the other contentions of appellants it is only necessary to indicate the propositions which the evidence of the parties tended to establish. On the part of the plaintiffs (appellees) the evidence tended to show that Dan. Sutherland, James

Hanson, William Chisholm and Jack Dalton, who compose the appellee company, and Peter Hall and one Hawes and C. P. Cahoon, were working at Pleasant camp in Alaska for William Chisholm on and prior to October, 1898. Prospecting on the river Porcupine was resolved on to be done by Hanson, Sutherland and Cahoon, and the following power of attorney was given to Cahoon:

"Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasant camp, British Columbia, have made, constituted and appointed, and by these presents do make, constitute and appoint, C. P. Cahoon, of Pleasant camp, British Columbia, our true and lawful attorney, for us and in our names, place and stead to locate a mining claim in the Territory of Alaska.

"In testimony whereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.

PETER HALL. [SEAL.]
WM. A. CHISHOLM. [SEAL.]
WM. S. HAWES. [SEAL.]

Signed, sealed, and delivered in the presence of—
DAN. SUTHERLAND.
J. HANSON."

Provisions were furnished the party, and they started out on the 4th of October, 1898, and met on the creek (subsequently given the name of McKinley) certain members of the appellant company. Gold was discovered, and Cahoon wrote notices of location for Chisholm and Hall upon a snag or stump in the creek, making their claims contiguous, and afterward reported that he had done so, saying that he had staked Chisholm first and Hall next. Chisholm and Hall went to the claims about the 20th of October, and cut trails to them, and did other work upon them; and at that time copied the notices of location and had them recorded. The notices with their endorsements were introduced in evidence.

The testimony was given by several witnesses and in great detail, and it was opposed at about all points by testimony of several witnesses, including Cahoon; and as to who first discovered gold there was a decided conflict whether Sutherland did, who is one of the appellee company, or whether Hackley did, under a location by whom the appellant company claims. Also a conflict as to whether Hackley protested when Cahoon wrote the notices of location for Chisholm and Hall, and whether Cahoon promised to take them down and authorized Hackley to do so, and upon his declining, authorized Lewis, one of the appellant company, to take them down and relocate Chisholm and Hall further up the creek, and whether Lewis did so.

1. It will be observed that the main controversy of fact between the parties was as to who made the first discovery of gold—Hackley or Sutherland. On this testimony appellants base three contentions, to which, they claim, the instructions asked by them at the trial court were addressed.

(1) That the discovery of mineral is a precedent condition to the making of a valid location, and that Hackley was the first to discover gold.

(2) That the locations relied on by appellees were invalid because they were not "distinctly marked on the ground, or otherwise designated as required by law."

(3) That the citizenship of Chisholm and Hall was put at issue by the pleadings, and no evidence was offered to establish it, but on the contrary the power of attorney under which Cahoon acted represents them to be citizens of British Columbia.

Without now questioning the soundness of either of these contentions, it is enough to say that the assignments of error based upon the refusal of instructions cannot be entertained. This is undoubtedly a suit in equity, and if it may be regarded as entertained under the general powers conferred by the act of May 17, 1884, 23 Stat. 24, error cannot be predicated upon the giving or the refusing of instructions. The verdict was but advisory to the court, to be adopted or disregarded at the court's discretion. This we regarded as indisputable, but in order that counsel might be heard upon the effect of the Oregon code, if regarded as applicable to Alaska, we requested briefs of counsel "as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a cause of this character, are open for consideration on appeal from the district court of Alaska."

In response to that request, counsel for appellant urge that by section 7 of the act of May 17, 1894, *supra*, the final judgments of a district court of Alaska are reviewable by this court "as in other cases," and that the terms, other cases, "necessarily refer to the procedure for review provided by sections 691 and 692, Revised Statutes, governing district and circuit courts having like jurisdiction." But the procedure there prescribed is for the purpose of reviewing error, and error, as we have already said, cannot be based on instructions given or refused in an equity case. Nor is the rule different in the State of Oregon. (*De Lashmutt* v. *Emerson*, 7 Or. 212; *Swegle* v. *Wells*, 7 Or. 222.)

2. There was no finding of facts by the court, and, assuming that we may look into the evidence, we find it conflicting as to who first discovered gold, Hackley or Sutherland. The court below evidently determined that Sutherland did, and, having no test of the credibility of the witnesses, we cannot pronounce that determination unsound. Sutherland seems to have been acting with and co-operating with Cahoon. At any rate, Sutherland is not contesting the locations made by Cahoon for Chisholm and Hall, but on the contrary asserts their validity and claims title under them. The locations, therefore, are valid so far as they depend upon the discovery of gold.

The second contention is that they are invalid because they were not "distinctly marked on the ground." The appellants base this contention on Cahoon's testimony. His testimony is that he wrote the notices of locations upon a stump or snag in the creek, and they were as follows: "I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side."

But the notices produced by other witnesses, and which were testified to be copies, as near as could be made out, of those on the stump, were respectively as follows:

"Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek, in Porcupine mining district, running into Porcupine River. This claim is the east extension of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine River, in the district of Alaska.

PETER HALL, *Locator.*

Witness: J. HANSON.
D. SUTHERLAND.

"Notice is hereby given that I, the undersigned, have, this sixth day of Oct., 1898, located a placer mining claim 1,500 ft. along creek bottom and 300 ft. from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, *Locator.*

Witnesses: D. SUTHERLAND.
JAMES HANSON."

These notices constituted a sufficient location; the creek was identified and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. (*Hawes* v. *Victoria Copper Mining Company*, 160 U. S. 303.)

3. Conceding, appellants say, a proper discovery and a proper description of the location, nevertheless as the citizenship of the locators was put in issue, it was necessary to be proved to justify a judgment for the appellees because under section 2319, R. S., the public lands of the United States are only open to exploration, occupation and purchase by citizens of the United States, and those who have declared their intention to become such.

In *Manuel* v. *Wulff*, (152 U. S. 505,) this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the Supreme Court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase and can only be divested of it by office found. The case of *Gouveneur* v. *Robertson*, (11 Wheat. 332,) was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said, that it has regard to the solemnity of the livery of seisin, which ought not to be devested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural born subject that is a resident in the kingdom and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

That grantees of the public land take by purchase this court, in *Manuel* v. *Wulff*, left no doubt. It was said that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. (*Forbes* v. *Grady*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Noyes* v. *Mantel*, 127 U. S. 348.)

The appellants, however, deny the application of *Manuel* v. *Wolff*, and contend that this suit having been brought under section 500 of the Oregon code, in order to maintain the suit the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that while the validity of the location may not be disputed by appellants, that the right to the possession, which is but an incident of the location may be. We do not concur in this view. The meaning of *Manuel* v. *Wolff* is that the location by an alien and of all of the rights following from such location are voidable, not void, and are free from attack by any one except the government.

It is not necessary to notice other points made by appellants, and, discovering no error in the record,

Judgment is affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.